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**SUPREME COURT OF THE
STATE OF WASHINGTON**

RECEIVED BY E-MAIL *b/h*

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT COMENOUT and ROBERT COMENOUT, SR, APPELLANTS

Pierce County Cause Nos. 08-1-04682-8 and 08-1-04680-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly find, under this Court's decision in *State v. Cooper*, that the state had criminal jurisdiction over Indian trust lands that were outside the boundary of any Indian reservation?
2. Did the trial court properly find that a prosecution for acts that did not comply with any applicable Indian cigarette tax contract and which also violated state laws regarding cigarette excise taxes could be pursued in state court?
3. Did the trial court properly deny the defendants' motion to dismiss when they failed to show any legal impediment to prosecution in state court?

B. STATEMENT OF THE CASE.

On October 7, 2008, the Pierce County Prosecutor's Office charged Robert Reginald Comenout, Sr with: 1) engaging in business of cigarette purchase, sale, consignment or distribution without a license; 2) unlawful possession or transportation of unstamped cigarettes; and, 3) theft in the first degree in Pierce County Cause No. 08-1-04682-8. SCP¹ 473-475, 476-477. That same day these charges were filed against Robert Reginald Comenout, Jr. in Pierce County Cause No. 08-1-04680-1. JCP 1-3, 4-5. Charges were also brought against Edward Comenout, brother and uncle to the other defendants, but these were dismissed when Edward

¹ Although the clerk's papers are largely duplicative, each defendant has designated his own clerk's papers. The clerk's papers pertaining to Robert Comenout Sr. will be referred to as "SCP". The clerk's papers pertaining to Robert Comenout Jr. will be referred to as "JCP."

Comenout died² while this appeal was pending.

The attorney for Edward Comenout filed motions to dismiss alleging that the state lacked jurisdiction over his client and the land where the offenses were alleged to have occurred. ECP³ 158, 159-160, 161-253, 254-268, 269-310, 311-347. The pleadings for Edward Comenout asserted that he was an enrolled member in the Quinault Indian Nation. ECP 311. This is not in dispute. *See* JCP 4-5; SCP 476-477. The pleadings filed on behalf of Robert Comenout Sr. assert that he is an enrolled member of the Tulalip tribe. SCP 559. Some pleadings filed on behalf of Robert Comenout, Jr. assert that his father and his uncle, Edward, were enrolled members of the Quinault tribe, but offer no averment as to his own status as an enrolled member of any tribe. JCP 78-80. A later pleading filed by Robert Comenout Jr asserts that his father is an enrolled member of the Tulalip Tribe, his uncle an enrolled member of the Quinaults, and that he is an enrolled member of the Yakima Indian Tribe. JCP 110-112, 113-115. There are no affidavits or declarations from any of the Comenouts attached to the motions to dismiss setting forth the factual support for their claim of enrolled Indian status.

On June 9, 2009, the court heard argument on the defendants' motions to dismiss for: 1) lack of jurisdiction over Indian trust land; and,

² Edward Amos Comenout, Jr. passed away on June 3, 2010.

³ This refers to clerk's papers certified from Edward Comenout's court file; other defendant's adopted the contents of these motions by reference. *See* JCP 158, 139-160; SCP 53-54, 55-56.

2) the existence of a tax compact which prevents the state from enforcing its tax laws against a "tribal retailer." The court denied the motions to dismiss and entered findings of fact and conclusions of law. JCP 81-84; SCP 411-414.

Defendants successfully sought discretionary review in the Court of Appeals, Division II. ECP 457-467. The Court of Appeals then certified the case to this Court.

Because this case is before the Court on interlocutory review, the facts underlying the charges have not been litigated or developed in the record. Some information regarding the prosecution's anticipated case can be gleaned for the declaration of probable cause and its memorandum opposing the motion to dismiss. JCP 4-5, SCP 476-477. The declaration of probable cause asserts the following:

Agents of WSLCB made numerous purchases, between April of 2007 and July 25th, 2008, of cigarettes that did not have tax stamps attached. On July 25th, 2008, agents from the Washington State Liquor Control Board ("WSLCB") served a search warrant on the Indian Country Store located at 908/920 River Road, Puyallup, Washington. The WSLCB agents seized 37,000 cartons of cigarettes (approximately 7.4 million cigarettes) that did not have Washington State authorized tax stamps attached. Generally, there were no stamps attached, although, a few packages did have Couer d' Alene tribal stamps attached. The Washington State cigarette excise tax is \$20.25 per carton. These are taxes that must be

paid at the time the cigarettes are purchased by a retail or a wholesale business. The loss of revenue to the State of Washington on 37,000 cartons is \$750,000.

The Indian Country Store is on land held in trust by the United States for several Indian individuals. Edward Amos Comenout, Jr., an enrolled Quinault Tribal member, [was] the majority owner. The daily activities of the business are the responsibility of Robert Comenout, Sr.; Robert Comenout, Jr. is an employee of the business. The Indian Country Store is not within the boundaries of any recognized Indian Reservation.

C ARGUMENT.

1. UNDER THIS COURT'S DECISION IN ***STATE V. COOPER***, THE TRIAL COURT PROPERLY FOUND THAT IT HAD CRIMINAL JURISDICTION OVER CRIMES ALLEGED TO HAVE OCCURRED AT THE COMENOUTS' INDIAN COUNTRY STORE WHICH IS OUTSIDE THE BOUNDARY OF ANY RESERVATION.

A determination of whether the state has criminal jurisdiction under RCW 37.12.010⁴ over particular Indian lands presents a question of state law. ***State v. Cooper***, 130 Wn.2d 770, 774, 779, 928 P.2d 406, (1996). In ***Cooper***, this Court set forth the history of Washington's assumption of jurisdiction over Indian lands and specifically addressed

⁴ See Appendix A for text of statute. The United States Supreme Court held that RCW 37.12.010 is constitutional and complies with federal legislation authorizing states to impose concurrent state jurisdiction in Indian country with or without tribal consent ("Public Law 280"). ***Washington v. Confederated Bands & Tribes of Yakima Indian Nation***, 439 U.S. 463, 473-74, 99 S. Ct. 740, 58 L.Ed.2d 740 (1979).

whether the state had criminal jurisdiction over crimes committed on Indian lands that were held in trust but which were outside the formal boundaries of a reservation. The court concluded that “Washington assumed full nonconsensual civil and criminal jurisdiction over all Indian country outside established Indian reservations.” *Cooper*, 130 Wn.2d at 775-76. The court specifically rejected an argument that the definition of “reservation” should be broadly construed to include trust lands outside of a reservation. 130 Wn.2d at 778-79.

In the trial court below it was uncontested that the “Indian Country Store” at 908/920 River Road, Puyallup, Washington, from which 37,000 cartons of unstamped cigarettes were seized, is on Indian trust land but not within the borders of any established Indian reservation. *See* JCP81-84, SCP 562-565, Uncontested Findings of Fact Nos. 1 and 5.⁵ As such, the state assumed criminal jurisdiction over any crime alleged to have occurred on that property pursuant to RCW 37.12.010. This case is controlled by this Court’s decision in *Cooper*. The trial court correctly determined that the state had criminal jurisdiction to prosecute for crimes allegedly committed at the Indian Country Store. Its decision should be upheld.

There is a long history of the Comenouts contesting the state’s jurisdiction to enforce its laws on the Indian Country Store property on

⁵ These findings are unchallenged on appeal and therefore, verities. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

River Road. In the 1970s, Edward Comenout unsuccessfully tried to enjoin the Washington Department of Revenue from searching this property and seizing unstamped cigarettes from it on the grounds that his property was exempt from a state excise tax on cigarettes under federal law. See *Matheson v. Kinnear*, 393 F.Supp. 1025 (W.D.Wash. 1975). Edward and Robert Comenout, Sr. filed a civil rights action against the State of Washington, the Department of Revenue, and the Liquor Control Board alleging that enforcement of the Washington liquor and cigarette tax laws on Indian trust land was illegal. *Comenout v. Washington*, 722 F.2d 574 (9th Cir. 1983) (affirming the District Court dismissal of the case as being barred by the Tax Injunction Act, 28 U.S.C. §1341). The opinion delineates that in 1977, the Department of Revenue filed an action in state court to enjoin Edward Comenout from selling unstamped cigarettes from his off-reservation store; the department won summary judgment and obtained a permanent injunction; the Court of Appeals dismissed Comenout's appeal as frivolous. *Id.* Edward Comenout has also tried to prevent enforcement of state laws regarding the unlicensed sale of fireworks on this property by asserting a lack of state jurisdiction. See, *State v. Comenout*, 85 Wn. App. 1099 (1997) (1997 WL 235496), *pet review denied*, 133 Wn.2d 1012, 946 P.2d 403 (1997) *cert. denied sub nom. Comenout v. Washington Dept. of Community Development*, 523 U.S. 1005, 118 S. Ct. 1187, 140 L.Ed.2d 318 (1997). These repeated attempts to avoid compliance with state tax and regulatory laws on the

grounds that Washington lacks any jurisdiction over this property -which is outside the boundaries of any reservation- have been consistently rejected by both state and federal courts.

The weakness of the Comenouts' position is also revealed by examining the decision of the United States Supreme Court in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) ("*Colville*"), which upheld this state's cigarette excise tax scheme even as applied to some on-reservation sales. In *Colville*, several Indian tribes challenged Washington's imposition of a cigarette tax sold to non-member Indians and non-Indians in on-reservation transactions. The Court upheld the tax: 'Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose taxes on Indians not members of the Tribe.' *Id.* at 160-61. The court found Washington's cigarette tax to be valid so long as the tax does not fall on the members of the Indian tribe on whose reservation the sale is taking place. *Id.* at 159. Under *Colville*, even if the Comenouts' Indian County Store were within the boundaries of a reservation, the State would still have the jurisdiction to enforce its cigarette excise tax on sales to non-Indians and non-member Indians.⁶

⁶ The Comenouts suggest *Colville* was superseded by the 1190 amendments to 25 U.S.C. 1301 (often referred to as the "*Duro* fix"). This amendment permits a tribe to assert misdemeanor criminal jurisdiction over all Indians. 25 U.S.C. 1301(2) and 1302(7). By its terms, however, this amendment "has no bearing on the State's ability to tax nonmembers." *Bercier v. Kiga*, 127 Wn. App. 809, 820, 103 P.3d 232 (2004). A state may tax Indian cigarette sales to non-members in

The Comenouts' reliance on *State v Pink*, 144 Wn. App. 945, 185 P.3d 634 (2008) is misplaced. In *Pink*, the Court of Appeals found that the state lacked jurisdiction to pursue criminal charges against an enrolled member of the Quinault Tribe for a firearm offense that occurred wholly *within* the boundaries of the Quinault Indian Reservation. The prosecution asserted that it had jurisdiction because the offense occurred on a state highway that had been built on an easement granted by the Quinault Tribe to build and maintain SR 109 over a portion of the Quinault Reservation. The appellate court ruled that the easement for the roadway did not cede any other authority to the State, so that while there was jurisdiction to prosecute non-members, there was no jurisdiction to prosecute an enrolled member of the Quinault Tribe for firearm crimes occurring on the portion of the highway within the boundaries of the reservation. *Pink*, 144 Wn. App. at 955-57. The Comenouts cannot rely upon *Pink*, because it is undisputed that the Indian County Store is *not* within the boundaries of a reservation. Consequently, *Cooper* is the controlling case and the trial court correctly found that it had jurisdiction.

Indian country. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512-513, 111 S. Ct. 905, 112 L.Ed2 1112 (1991).

2. ACTS THAT VIOLATE STATE LAWS REGARDING CIGARETTE EXCISE TAXES AND WHICH ARE NOT IN COMPLIANCE WITH ANY APPLICABLE INDIAN CIGARETTE TAX CONTRACT MAY BE PROSECUTED IN STATE COURT; THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS.

a. Overview of Washington's Cigarette excise tax laws.

The State of Washington imposes a cigarette excise tax on all cigarettes sold, used, consumed, handled, possessed, or distributed in the state. RCW 82.24.020⁷; *Matheson v. Washington State Liquor Control Board*, 132 Wn. App. 280, 284, 130 P.3d 897 (2006). The tax is enforced by requiring cigarette tax stamps to be affixed to packages of cigarettes; the stamp might reflect that there has been payment of the applicable state cigarette tax or payment of a tribal tax collected under a cigarette tax contract (both of these are, effectively, a precollection of the taxes subsequently obtained from the purchaser), or the stamp might reflect the tax-exempt status of the cigarettes. RCW 43.06.455(4)⁸; RCW 82.24.030(1)⁹; *Matheson*, 132 Wn. App. at 284. Nevertheless, every package of cigarettes sold at retail must bear an appropriate stamp, and retailers and consumers are prohibited from possessing unstamped cigarettes. RCW 82.24.120¹⁰. Unstamped cigarettes are “contraband”

⁷ This statute has been amended since the offense date charged in the information. See Appendix B for the version of this statute that was in effect at the time of the alleged offense.

⁸ See Appendix C for text of statute.

⁹ See Appendix D for text of statute.

¹⁰ See Appendix E for text of statute.

under Washington law and it is a felony to possess more than 10,000 cigarettes without the proper tax stamps attached. RCW 82.24.110¹¹ and 82.24.120. The only persons authorized to possess state cigarette tax stamps or unstamped cigarettes are licensed wholesalers as they are required to affix the stamps prior to sale. RCW 82.24.030(3); RCW 82.24.040¹². Other than a licensed wholesaler using his own vehicle, any person transporting or causing the transport of unstamped cigarettes into the state must give advance notice regarding the shipment to the Washington State Liquor Control Board (WSLCB). RCW 82.24.250¹³; WAC § 458-20-186¹⁴, WAC § 458-20-192(9)(a)(iii).¹⁵

As set forth earlier in the brief, the state may not tax cigarettes sold to an enrolled member of a tribe in a transaction occurring on that tribe's reservation. *Colville*, 447 U.S. at 158-161; *see also*, RCW 82.24.900 ("The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States."). Packages of cigarettes sold in this tax exempt manner, however, must bear an exempt stamp. RCW 82.24.030(2); WAC § 458-20-192(9)(a)(ii).

In contrast, cigarettes sales by an Indian tribal organization to non-Indians or non-member Indians are subject to the State's cigarette tax, *see*

¹¹ See Appendix F for text of statute.

¹² See Appendix G for text of statute.

¹³ See Appendix H for text of statute.

¹⁴ See Appendix I for text of regulation.

¹⁵ See Appendix J for text of regulation.

Former RCW 82.24.020(4) (amended eff. May 1, 2010 and recodified at RCW 82.24.020(4), and the incidents of the tax falls on the retail purchaser. *See United States v. Baker*, 63 F.3d 1478, 1489-90 (9th Cir. 1995). The Indian seller does not pay the tax; rather, the Indian seller merely precollects the tax on behalf of the retail purchaser, RCW 82.24.080(2), an obligation upheld by the Supreme Court in *Colville*, 447 U.S. at 158-61.

b. Cigarette Tax Contracts between Washington State and Indian Tribes, Including the Quinaults

In 2001, the Washington Legislature authorized the governor to enter into agreements concerning cigarette tax collection ("cigarette tax contracts") with a limited list of federally recognized tribes, including the Quinault Nation. RCW 43.06.455 and 43.06.460 ("The governor is authorized to enter into cigarette tax contracts with the ... Quinault Nation"). Under a tax contract, the tribe is permitted to collect and retain the cigarette taxes for "essential government services." RCW 43.06.455(8). The legislative goal behind these contracts was to "provide a means to promote economic development, provide needed revenues for tribal governments and Indian persons, and enhance enforcement of the state's cigarette tax law, ultimately saving the state money and reducing conflict." RCW 43.06.450.

Cigarette tax contracts pertain to "retail sales in which Indian retailers make delivery and physical transfer of possession of the cigarettes

from the seller to the buyer within Indian country.” RCW 43.06.455. Cigarette tax contracts must meet the requirements of RCW 43.06.455, and require that all cigarettes sold bear a traceable tribal stamp, affixed by means which assures precollection of the tax by wholesalers, and must limit the source of supply to specified wholesalers or manufacturers. RCW 43.06.455(4) and (5). Contracts must also include provisions for compliance, such as transport and notice requirements, inspection procedures, stamping, recordkeeping and audit requirements, and dispute resolution procedures. RCW 43.06.455(7) and (13). Other than an exemption for a tribal member, a cigarette tax contract “shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers.” RCW 43.06.455(3). The purpose of a cigarette tax contract is to allow the tribe to collect an equivalent tribal cigarette tax and use the tax proceeds for essential tribal government services as opposed to allowing Indian retailers to sell tax free cigarettes to non-members. RCW 43.06.455(8). The state excise taxes on cigarettes do not apply to “the sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax contract.” RCW 82.24.295. This contractual forbearance from imposing and collecting the state cigarette tax is generally referred to as a “retrocession.” The statute allows the State to enter into a Tax Contract addressing cigarette sales by any “Indian retailer.” RCW 43.06.455(2).

An "Indian retailer", is defined as "(i) a retailer wholly owned and operated by an Indian tribe, (ii) a business wholly owned and operated by a tribal member and licensed by the tribe, or (iii) a business owned and operated by the Indian person or persons in whose name the land is held in trust." RCW 43.06.455(14)(b). However, a particular tax contract with a tribe may be narrower in scope than what is permitted in the enabling statute. Where the specific terms of an Indian cigarette tax contract is narrower, it "shall take precedence over any conflicting provisions in this chapter." RCW 82.24.020(7). Thus, although under a Tax Contract, the State gives up its taxing authority over cigarette sales made in compliance with the terms of the contract, RCW 82.24.295(1), for transactions not covered by the terms of the contract, the state remains responsible "for enforcement activities that come under the terms of chapter 82.24 RCW." RCW 43.06.455(12).

In 2005, the Governor entered into a cigarette tax contract with the Quinault Nation. JCP 32-50; SCP 529-547; *see* Appendix K. By its terms, this contract is limited to the "retail sale of cigarettes by tribal retailers." Part II(2). The term "tribal retailer" as defined in the Quinault contract is narrower than the definition "Indian retailer" found in the enabling statute. *See*, RCW 43.06.455. Under the terms of the contract a "tribal retailer" is "a cigarette retailer *wholly owned by the Quinault Nation* and located in Indian country or a member-owned smokeshop located in Indian country *and licensed by the Tribe.*" *Id.* at p. 5 (emphasis

added). “Tribe” means the Quinault Nation and “member” refers to an enrolled member of the Quinault Nation. *Id.* Thus, to qualify as a “tribal retailer” under the Quinault Tax Contract, a retailer must be an enrolled member¹⁶ of the Quinault Nation *and* be licensed by the tribe. In particular, the third definition of “Indian retailer” contained in RCW 43.06.455(14)(b), that is “a business owned and operated by the Indian person or persons in whose name the land is held in trust,” has been eliminated from the definition of “tribal retailer” contained in the Quinault Tax Contract. Thus, under RCW 82.24.020(7) the terms of the contract control the meaning of the term “tribal retailer” and the scope of the State’s tax retrocession.¹⁷ The contract does not require the Quinault Nation to allow the operation of member-owned smokeshops, but rather leave it “entirely within the discretion of the Tribe as to whether it allows retail sales of cigarettes by its members.” Part III(1)(c).

The Quinault contract requires the Tribe to impose “taxes on all sales by tribal retailers of cigarette to purchasers¹⁸ within Indian country”, and requires that “[a]ll cigarettes sold by tribal retailers shall bear either a Washington State Tribal Compact Stamp or a Quinault Nation Tax Stamp.” *Id.* at pp. 6, 8. Wholesalers or the Tribe bear the responsibility for affixing the tax stamps to the cigarettes that will be sold or distributed

¹⁶ Only the late Edward Comenout was an enrolled member of the Quinault Nation.

¹⁷ It does not appear that the applicability of RCW 82.24.020(7) was brought to the attention of the commissioner who granted discretionary review.

by the tribal retailer. *Id.* at p. 9. The contract states that “[a]s to all transactions that conform to the requirements of this Compact, such transactions do not violate state law, and the State agrees that it will not assert that any such transaction violates state law for the purpose of [the federal Contraband Cigarette Trafficking Act].” *Id.* at p. 9. The contract also indicates that the state retained enforcement responsibilities of state cigarette tax laws. *Id.* at p. 11. In particular, the contract provides that “[t]he Quinault Nation is responsible for enforcement of the terms of this Compact and administration of the compact,” PART X(1), but for retailers not covered by the Compact, the state remains “responsible for enforcement activities that come under the terms of Chapter 82.24 RCW.” Part VII(1). More importantly, as relevant here, under Quinault law “tribal retailers are the only retail businesses authorized to sell cigarettes within Indian country.”¹⁹ Quinault National Code 86.11.010. The only “tribal retailers” recognized by Quinault law are the three tribally-owned retailers. Quinault Nation Code 84.04.010(b). The Statutory Scheme and Quinault Tax Contract do not exempt the Comenouts from State Taxation.

Under the Quinault Tax contract, the state retroceded its taxing authority only on those cigarette sales that conformed to the terms of the

¹⁸ Exempting tribal members over the age of eighteen.

¹⁹ “Indian country” is refers to the Quinault reservation, and all Indian trust lands held for the benefit of the Quinault Nation of a Quinault member. Quinault Nation Code 86.02.010(i).

tax contract. Thus, the existence of a contract with the Quinaults would not preclude the state from attempting to enforce state cigarette tax laws where there was evidence that a party was acting outside the terms of the Quinault tax contract - provided that the state had jurisdiction over the location where the violations occurred.

While the factual issues have yet to be determined at a trial in this case, there is information in the record to show that the prosecution has evidence of the following: there were sales of unstamped cigarettes at the Indian Country Store which demonstrates a lack of compliance with state law and/or the Quinault tax contract. The 37, 000 cases of cigarettes seized from the Indian Country store were not stamped (or not stamped with a valid Washington tax stamp) and, therefore, were not in compliance with the terms of either the tax contract and or state law. The Indian Country Store was not a "tribal retailer" under the terms of the Quinault contract because it was not licensed by the Quinaults. The lack of stamps on the 37, 000 cartons of cigarettes indicates that \$750, 000 in tax money owed to the State has not been collected as required by law. Thus, there is reason to believe that state laws have been violated and the Comenouts have failed to show any legal bar to their continued prosecution below

As the Comenouts' Indian Country Store was not operating in conformance with the terms of the Quinault contract, they cannot claim

the exemption in RCW 82.24.295 from the application of state laws. As their actions were not in compliance with an Indian tax contract, they were required to conform to state laws imposing an excise tax on cigarettes. The State is seeking to prove that lack of compliance at a trial on the merits. The trial court properly denied the motion to dismiss as there is no legal bar to proceeding with the prosecution below.

c. The Quinault Tax Contract Governs the Scope of the State's Tax Retrocession.

As set forth above, The Quinault Tax Contract provides that only those transactions which conform with the Contract's requirements conform with State law, whereas the enabling statute simply states that a contract shall provide for a tribal cigarette tax in lieu of all State cigarette taxes. Second, the Tax Contract's definition of tribal retailer is limited to two of three possible categories of "Indian Retailer" defined in RCW 43.06.455(14)(b), that is, those defined in subsections (i) and (ii). The Tax Contract explicitly requires that cigarette transactions must conform with the terms of the Contract to be exempted from enforcement of State law. Thus, those transactions that do not conform to the Tax Contracts' requirements must violate State cigarette laws because the State has not contractually retroceded its taxing authority over non-conforming sales.

To date, this Court has not addressed the Quinault Tax Contract, or any similar cigarette tax contract. However, three district courts in the Western District of Washington have addresses the scope of tax

retrocession by the State of Washington based on a similar contract entered between the State and the Swinomish tribe. In each case, the court concluded that transactions that failed to conform with the Swinomish Tribal Tax Contract violated the Washington State laws and, thus, met the definition of “contraband cigarettes” under the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 et seq.²⁰ *See United States v. Funds ...held in the Name of R K Company, Inc., d/b/a Cigar Cartel Totaling \$201,147.00 (Cigar Cartel)*, 639 F.Supp.2d 1203, 1206-11 (W.D. WA 2009) (cigarette transactions that failed to conform to the Tax Contract’s requirements violated state and federal cigarette laws). These courts each concluded that the language of the Swinomish contract was what controlled the scope of the State’s tax retrocession. These cases expressly rejected the claim that the State retroceded its taxing authority for all cigarette sales on the reservation during the Tax Contract’s “effective period,” regardless of whether the sales complied with, or flouted, the requirements of the contract. There is no doubt that the tax contract enabling statute provides that a cigarette tax contract “shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers.” RCW § 43.06.455(3). The language of the enabling statute

²⁰ This statute, which was enacted to assist the state in enforcing their cigarette laws defines “contraband cigarettes” as a specified number of cigarettes that “bear no evidence of the payment of applicable State or Local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp.” 18 U.S.C. § 2341(2)

envisioned a negotiated agreement with the statute merely defining the outer parameters of when the State may retrocede its taxing authority. *See, e.g.*, RCW 43.06.455(10) (“The governor may delegate the power to *negotiate* cigarette tax contracts to the department of revenue.”) (emphasis added). Neither the governor nor the negotiating tribes were obligated to include an Indian retailer falling within the scope of the RCW 43.06.455(14)(b)(iii) definition in their tribal cigarette contract. The statutory definitions of “Indian retailer” are stated in the disjunctive, *see* RCW § 43.06.455(14)(b), and nothing in the statutory scheme requires a tax contract’s retrocession be extended to all classes of “Indian retailers.” The parties were free to negotiate a tax contract which limits the State’s tax retrocession to only a sub-set of Indian retailers. *See Cigar Cartel*, 639 F.Supp.2d at 1211 (“The Contract expressly limits its application ‘to the retail sale of cigarettes by tribal retailers.’”). It would defeat the purpose of such negotiations if the agreement did not then control the scope of retrocession. To interpret the statutes as the Comenouts suggest would grant retrocession that is more expansive than the parties intended, and for which they contracted. Moreover, the fact that legislature intended that Tax Contracts could be narrower in scope than the enabling statute is directly established by RCW § 82.24.020(7) which provides that “[i]f the state enters into any cigarette contract or agreement with a federally recognized Indian tribe under chapter 43.06 RCW, *the terms of the contract or agreement shall take precedence over any conflicting*

provisions of this chapter while the contract or agreement is in effect.”

RCW § 82.24.020(7) (2008) (emphasis added). With this provision is the legislature’s reinforced, and made explicit, that the language and scope of the tax contract controls the scope of retrocession from state tax. Simply put, the Tax Contract’s tax retrocession was not intended to provide amnesty from tax collection, but rather, to shift the recipient of the taxes from the State to the Tribe. Where, as here, if a retailer does not fall within the scope of the contract, then no shift has occurred, and the retailer must comply with the State taxation scheme.

D. CONCLUSION.

This court should affirm the trial court’s denial of the motion to dismiss and remand for further proceedings.

DATED: April 25, 2011.

MARK LINDQUIST
Pierce County, Prosecuting Attorney

Thomas C. Roberts (17442 Ber)
KATHLEEN PROCTOR,
Deputy Prosecuting Attorney
WSB # 14811

Thomas C. Roberts
THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

4.25.18 
Date Signature

85067-4

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SUPREME COURT
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

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APPENDIX "A"

RCW 37.12.010

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West's RCWA 37.12.010

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West's Revised Code of Washington Annotated Currentness

Title 37. Federal Areas--Indians (Refs & Annos)

Chapter 37.12. Indians and Indian Lands--Jurisdiction (Refs & Annos)

→ **37.12.010. Assumption of criminal and civil jurisdiction by state**

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

CREDIT(S)

[1963 c 36 § 1; 1957 c 240 § 1.]

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APPENDIX “B”

FORMER RCW 82.24.020

Former RCW 82.24.020; Laws of Washington 2008 Ch 86, § 301 and Ch. 226, §3 (eff. June 12 2008).

(1) There is levied and there shall be collected as provided in this chapter, a tax upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to one and fifteen one-hundredths cents per cigarette.

(2) An additional tax is imposed upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to five hundred twenty-five one-thousandths of a cent per cigarette. All revenues collected during any month from this additional tax shall be deposited in the violence reduction and drug enforcement account under RCW 69.50.520 by the twenty-fifth day of the following month.

(3) An additional tax is imposed upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to two and five one-hundredths cents per cigarette. All revenues collected during any month from this additional tax shall be deposited in the health services account created under RCW 43.72.900 by the twenty-fifth day of the following month.

(4) Wholesalers subject to the payment of this tax may, if they wish, absorb five one-hundredths cents per cigarette of the tax and not pass it on to purchasers without being in violation of this section or any other act relating to the sale or taxation of cigarettes.

(5) For purposes of this chapter, "possession" shall mean both (a) physical possession by the purchaser and, (b) when cigarettes are being transported to or held for the purchaser or his or her designee by a person other than the purchaser, constructive possession by the purchaser or his or her designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.

(6) In accordance with federal law and rules prescribed by the department, an enrolled member of a federally recognized Indian tribe may purchase cigarettes from an Indian tribal organization under the jurisdiction of the member's tribe for the member's own use exempt from the applicable taxes imposed by this chapter. Except as provided in subsection (7) of this section, any person, who purchases cigarettes from an Indian tribal organization and who is not an enrolled member of the federally recognized Indian tribe within whose jurisdiction the sale takes place, is not exempt from the applicable taxes imposed by this chapter.

(7) If the state enters into a cigarette tax contract or agreement with a federally recognized Indian tribe under chapter 43.06 RCW, the terms of the contract or agreement shall take precedence over any conflicting provisions of this chapter while the contract or agreement is in effect.

APPENDIX “C”

RCW 43.06.455

Westlaw

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West's Revised Code of Washington Annotated Currentness

Title 43. State Government--Executive (Refs & Annos)

Chapter 43.06. Governor (Refs & Annos)

→ 43.06.455. Cigarette tax contracts--Requirements--Use of revenue--Enforcement--Definitions

(1) The governor may enter into cigarette tax contracts concerning the sale of cigarettes. All cigarette tax contracts shall meet the requirements for cigarette tax contracts under this section. Except for cigarette tax contracts under RCW 43.06.460, the rates, revenue sharing, and exemption terms of a cigarette tax contract are not effective unless authorized in a bill enacted by the legislature.

(2) Cigarette tax contracts shall be in regard to retail sales in which Indian retailers make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian country, and are not in regard to transactions by non-Indian retailers. In addition, contracts shall provide that retailers shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen years.

(3) A cigarette tax contract with a tribe shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers. The tribe may allow an exemption for sales to tribal members.

(4) Cigarette tax contracts shall provide that all cigarettes possessed or sold by a retailer shall bear a cigarette stamp obtained by wholesalers from a bank or other suitable stamp vendor and applied to the cigarettes. The procedures to be used by the tribe in obtaining tax stamps must include a means to assure that the tribal tax will be paid by the wholesaler obtaining such cigarettes. Tribal stamps must have serial numbers or some other discrete identification so that each stamp can be traced to its source.

(5) Cigarette tax contracts shall provide that retailers shall purchase cigarettes only from:

(a) Wholesalers or manufacturers licensed to do business in the state of Washington;

(b) Out-of-state wholesalers or manufacturers who, although not licensed to do business in the state of Washington, agree to comply with the terms of the cigarette tax contract, are certified to the state as having so agreed, and who do in fact so comply. However, the state may in its sole discretion exercise its administrative and enforcement powers over such wholesalers or manufacturers to the extent permitted by law;

(c) A tribal wholesaler that purchases only from a wholesaler or manufacturer described in (a), (b), or (d) of this subsection; and

(d) A tribal manufacturer.

(6) Cigarette tax contracts shall be for renewable periods of no more than eight years. A renewal may not include a renewal of the phase-in period.

(7) Cigarette tax contracts shall include provisions for compliance, such as transport and notice requirements, inspection procedures, stamping requirements, recordkeeping, and audit requirements.

(8) Tax revenue retained by a tribe must be used for essential government services. Use of tax revenue for subsidization of cigarette and food retailers is prohibited.

(9) The cigarette tax contract may include provisions to resolve disputes using a nonjudicial process, such as mediation.

(10) The governor may delegate the power to negotiate cigarette tax contracts to the department of revenue. The department of revenue shall consult with the liquor control board during the negotiations.

(11) Information received by the state or open to state review under the terms of a contract is subject to the provisions of RCW 82.32.330.

(12) It is the intent of the legislature that the liquor control board and the department of revenue continue the division of duties and shared authority under chapter 82.24 RCW and therefore the liquor control board is responsible for enforcement activities that come under the terms of chapter 82.24 RCW.

(13) Each cigarette tax contract shall include a procedure for notifying the other party that a violation has occurred, a procedure for establishing whether a violation has in fact occurred, an opportunity to correct such violation, and a provision providing for termination of the contract should the violation fail to be resolved through this process, such termination subject to mediation should the terms of the contract so allow. A contract shall provide for termination of the contract if resolution of a dispute does not occur within twenty-four months from the time notification of a violation has occurred. Intervening violations do not extend this time period. In addition, the contract shall include provisions delineating the respective roles and responsibilities of the tribe, the department of revenue, and the liquor control board.

(14) For purposes of this section and RCW 43.06.460, 82.08.0316, 82.12.0316, and 82.24.295:

(a) "Essential government services" means services such as tribal administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development;

(b) "Indian retailer" or "retailer" means (i) a retailer wholly owned and operated by an Indian tribe, (ii) a business wholly owned and operated by a tribal member and licensed by the tribe, or (iii) a business owned and operated by the Indian person or persons in whose name the land is held in trust; and

(c) "Indian tribe" or "tribe" means a federally recognized Indian tribe located within the geographical boundaries of the state of Washington.

CREDIT(S)

[2001 c 235 § 2.]

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Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

→ 82.24.030. Stamps

(1) In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department. The stamps must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid or whether an exemption from the tax applies.

(2) Except as otherwise provided in this chapter, only a wholesaler shall cause to be affixed on every package of cigarettes, stamps of an amount equaling the tax due thereon or stamps identifying the cigarettes as exempt before he or she sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: PROVIDED, That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

(3) Only wholesalers may purchase or obtain cigarette stamps. Wholesalers shall not sell or provide stamps to any other wholesaler or person.

(4) Each roll of stamps, or group of sheets, shall have a separate serial number, which shall be legible at the point of sale. The department of revenue shall keep records of which wholesaler purchases each roll or group of sheets. If the department of revenue permits wholesalers to purchase partial rolls or sheets, in no case may stamps bearing the same serial number be sold to more than one wholesaler. The remainder of the roll or sheet, if any, shall either be retained for later purchases by the same wholesaler or destroyed.

(5) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

CREDIT(S)

[2003 c 114 § 2, eff. July 27, 2003; 1995 c 278 § 2; 1990 c 216 § 1; 1975 1st ex.s. c 278 § 61; 1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

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Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

→ **82.24.120. Violations--Penalties and interest**

(1) If any person, subject to the provisions of this chapter or any rules adopted by the department of revenue under authority hereof, is found to have failed to affix the stamps required, or to have them affixed as herein provided, or to pay any tax due hereunder, or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration hereof, there shall be assessed and collected from such person, in addition to any tax that may be found due, a remedial penalty equal to the greater of ten dollars per package of unstamped cigarettes or two hundred fifty dollars, plus interest on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment, and upon notice mailed to the last known address of the person or provided electronically as provided in RCW 82.32.135. The amount shall become due and payable in thirty days from the date of the notice. If the amount remains unpaid, the department or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes, penalties, and interest.

(2) The department, for good reason shown, may waive or cancel all or any part of penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment.

(3) The keeping of any unstamped articles coming within the provisions of this chapter shall be prima facie evidence of intent to violate the provisions of this chapter.

(4) This section does not apply to taxes or tax increases due under RCW 82.24.280.

CREDIT(S)

[2007 c 111 § 102, eff. July 22, 2007; 2006 c 14 § 6, eff. June 7, 2006; 1996 c 149 § 7; 1995 c 278 § 8; 1990 c 267 § 1; 1975 1st ex.s. c 278 § 64; 1961 c 15 § 82.24.120. Prior: 1949 c 228 § 15; 1939 c 225 § 25; 1935 c 180 § 87; Rem. Supp. 1949 § 8370-87.]

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Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

→ **82.24.110. Other offenses--Penalties**

(1) Each of the following acts is a gross misdemeanor and punishable as such:

(a) To sell, except as a licensed wholesaler engaged in interstate commerce as to the article being taxed herein, without the stamp first being affixed;

(b) To sell in Washington as a wholesaler to a retailer who does not possess and is required to possess a current cigarette retailer's license;

(c) To use or have in possession knowingly or intentionally any forged or counterfeit stamps;

(d) For any person other than the department of revenue or its duly authorized agent to sell any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(e) For any person other than the department of revenue, its duly authorized agent, or a licensed wholesaler who has lawfully purchased or obtained them to possess any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(f) To violate any of the provisions of this chapter;

(g) To violate any lawful rule made and published by the department of revenue or the board;

(h) To use any stamps more than once;

(i) To refuse to allow the department of revenue or its duly authorized agent, on demand, to make full inspection of any place of business where any of the articles herein taxed are sold or otherwise hinder or prevent such inspection;

(j) For any retailer to have in possession in any place of business any of the articles herein taxed, unless the same have the proper stamps attached;

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(k) For any person to make, use, or present or exhibit to the department of revenue or its duly authorized agent, any invoice for any of the articles herein taxed which bears an untrue date or falsely states the nature or quantity of the goods therein invoiced;

(l) For any wholesaler or retailer or his or her agents or employees to fail to produce on demand of the department of revenue all invoices of all the articles herein taxed or stamps bought by him or her or received in his or her place of business within five years prior to such demand unless he or she can show by satisfactory proof that the nonproduction of the invoices was due to causes beyond his or her control;

(m) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein;

(n) For any person to possess or transport in this state a quantity of ten thousand cigarettes or less unless the proper stamps required by this chapter have been affixed or unless: (i) Notice of the possession or transportation has been given as required by RCW 82.24.250; (ii) the person transporting the cigarettes has in actual possession invoices or delivery tickets which show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported; and (iii) the cigarettes are consigned to or purchased by any person in this state who is authorized by this chapter to possess unstamped cigarettes in this state;

(o) For any person to possess or receive in this state a quantity of ten thousand cigarettes or less unless the proper stamps required by this chapter have been affixed or unless the person is authorized by this chapter to possess unstamped cigarettes in this state and is in compliance with the requirements of this chapter; and

(p) To possess, sell, distribute, purchase, receive, ship, or transport within this state any container or package of cigarettes that does not comply with this chapter.

(2) It is unlawful for any person knowingly or intentionally to possess or to:

(a) Transport in this state a quantity in excess of ten thousand cigarettes unless the proper stamps required by this chapter are affixed thereto or unless: (i) Proper notice as required by RCW 82.24.250 has been given; (ii) the person transporting the cigarettes actually possesses invoices or delivery tickets showing the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported; and (iii) the cigarettes are consigned to or purchased by a person in this state who is authorized by this chapter to possess unstamped cigarettes in this state; or

(b) Receive in this state a quantity in excess of ten thousand cigarettes unless the proper stamps required by this chapter are affixed thereto or unless the person is authorized by this chapter to possess unstamped cigarettes in this state and is in compliance with this chapter.

Violation of this subsection (2) shall be punished as a class C felony under Title 9A RCW.

(3) All agents, employees, and others who aid, abet, or otherwise participate in any way in the violation of the provisions of this chapter or in any of the offenses described in this chapter shall be guilty and punishable as principals, to the same extent as any wholesaler or retailer or any other person violating this chapter.

(4) For purposes of this section, "person authorized by this chapter to possess unstamped cigarettes in this state" has the same meaning as in RCW 82.24.250.

CREDIT(S)

[2008 c 226 § 4, eff. June 12, 2008; 2003 c 114 § 5, eff. July 27, 2003; 1999 c 193 § 2; 1997 c 420 § 4; 1995 c 278 § 7; 1990 c 216 § 4; 1987 c 496 § 1; 1975 1st ex.s. c 278 § 63; 1961 c 15 § 82.24.110. Prior: 1941 c 178 § 15; 1935 c 180 § 86; Rem. Supp. 1941 § 8370-86.]

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Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

→ 82.24.040. Duty of wholesaler

(1) Except as authorized by this chapter, no person other than a licensed wholesaler shall possess in this state unstamped cigarettes.

(2) No wholesaler in this state may possess within this state unstamped cigarettes except that:

(a) Every wholesaler in the state who is licensed under Washington state law may possess within this state unstamped cigarettes for such period of time after receipt as is reasonably necessary to affix the stamps as required; and

(b) Any wholesaler in the state who is licensed under Washington state law and who furnishes a surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of the wholesaler's stock as may be necessary for the conduct of the wholesaler's business in making sales to persons in another state or foreign country or to instrumentalities of the federal government. Such unstamped stock shall be kept separate and apart from stamped stock.

(3) Every wholesaler licensed under Washington state law shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state or to a federal instrumentality, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the department, at Olympia, not later than the fifteenth day of the following calendar month. For failure to comply with the requirements of this section, the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed.

(4) Unstamped cigarettes possessed by a wholesaler under subsection (2) of this section that are transferred by the wholesaler to another facility of the wholesaler within the borders of Washington shall be transferred in compliance with RCW 82.24.250.

(5) Every wholesaler who is licensed by Washington state law shall sell cigarettes to retailers located in Washington only if the retailer has a current cigarette retailer's license or is an Indian tribal organization authorized to possess untaxed cigarettes under this chapter and the rules adopted by the department.

(6) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

CREDIT(S)

[2003 c 114 § 3, eff. July 27, 2003; 1995 c 278 § 3; 1990 c 216 § 2; 1969 ex.s. c 214 § 1; 1961 c 15 § 82.24.040. Prior: 1959 c 270 § 4; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

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Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

→ **82.24.250. Transportation of unstamped cigarettes--Invoices and delivery tickets required--Stop and inspect**

(1) No person other than: (a) A licensed wholesaler in the wholesaler's own vehicle; or (b) a person who has given notice to the board in advance of the commencement of transportation shall transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.

(2) When transporting unstamped cigarettes, such persons shall have in their actual possession or cause to have in the actual possession of those persons transporting such cigarettes on their behalf invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported.

(3) If unstamped cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by this chapter to possess unstamped cigarettes in this state.

(4) In the absence of the notice of transportation required by this section or in the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not a person authorized by this chapter to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

(5) Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

(6) In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

(7) For purposes of this section, the term "person authorized by this chapter to possess unstamped cigarettes in this state" means:

- (a) A wholesaler, licensed under Washington state law;
- (b) The United States or an agency thereof;
- (c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department; and
- (d) Any purchaser or consignee of unstamped cigarettes, including an Indian tribal organization, who has given notice to the board in advance of receiving unstamped cigarettes and who within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

Nothing in this subsection (7) shall be construed as modifying RCW 82.24.050 or 82.24.110.

(8) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

(9) Nothing in this section shall be construed as limiting the right to travel upon all public highways under Article III of the treaty with the Yakamas of 1855.

CREDIT(S)

[2008 c 226 § 5, eff. June 12, 2008; 2003 c 114 § 8, eff. July 27, 2003; 1997 c 420 § 7; 1995 c 278 § 10; 1990 c 216 § 6; 1972 ex.s. c 157 § 6.]

Current with 2011 Legislation effective through April 10, 2011

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APPENDIX “I”

WAC 458-20-186

WAC 458-20-186

Tax on cigarettes.

(1) **Introduction.** This rule addresses those taxes activities that apply exclusively to cigarettes as defined by RCW 82.24.010. See WAC 458-20-185 for tax liabilities associated with tobacco products other than cigarettes. The tax on cigarettes is in addition to all other taxes owed. For example, retailers and wholesalers are liable for business and occupation tax on their retailing or wholesaling activities, and must collect and remit sales tax on retail sales of cigarettes. Consumers pay the cigarette tax in addition to sales or use tax on purchases of cigarettes for consumption within this state. (Wholesalers not licensed in the state of Washington who are making sales of cigarettes to Indians in accordance with a cigarette tax contract authorized by RCW 43.06.455 must comply with the specific terms of their individual contracts. See also WAC 458-20-192 regarding sales in Indian country.)

(2) **Licensing requirements and responsibilities.** The Washington state liquor control board assumed the licensing responsibilities for cigarettes on July 1, 2009. Please see chapters 314-33 and 314-34 WAC.

(3) **Organization of rule.** The information provided in this rule is divided into six parts:

- (a) Part I explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in this state.
- (b) Part II explains the stamping requirements and how the cigarette tax rates are calculated.
- (c) Part III describes the exemptions from the tax and the procedures that must be followed to qualify for exemption.
- (d) Part IV explains the requirements and responsibilities for persons transporting cigarettes in Washington.
- (e) Part V explains the requirements and responsibilities for persons engaged in making delivery sales of cigarettes into this state.
- (f) Part VI explains the enforcement and administration of the cigarette tax.

Part I - Tax on Cigarettes

(101) **In general.** The Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

(a) **Possession.** For the purpose of this rule, a "possessor" of cigarettes is anyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state.

(b) **Payment.** Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department of revenue (department) to sell the stamps. Only licensed wholesalers may purchase or obtain cigarette stamps. Except as specifically provided in Part III of this rule, it is unlawful for any person other than a licensed wholesaler to possess unstamped cigarettes in this state. However, as explained in subsection (102)(b) of this rule, certain consumers may possess unstamped cigarettes for personal consumption if they pay the tax as provided in this rule.

(c) **Imposition of tax.** Ordinarily, the tax obligation is imposed on and collected from the first possessor of unstamped cigarettes. However, failure of an exempt entity with an obligation to collect and remit the tax does not relieve a subsequent nonexempt possessor of unstamped cigarettes from liability for the tax.

(d) **Promotions.** Cigarettes given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state, but are not required to have the stamp affixed. Instead, the manufacturer of the cigarettes must pay the tax on a monthly return filed with the department. See subsection (602) of this rule.

(102) Possession of cigarettes in Washington state.

(a) Every person who is (i) in possession of unstamped cigarettes in this state, and (ii) is not specifically exempt by law, is liable for payment of the cigarette tax as provided in chapter 82.24 RCW and this rule.

(b) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the cigarette tax as provided in subsection (602) of this rule when they first bring the cigarettes into this state or first possess them in this state. This requirement includes, but is not limited to, delivery sales as described in Part VI of this rule.

(c) **Cigarettes purchased from Indian retailers.** Special rules apply to cigarettes purchased from Indian retailers.

(i) Indians purchasing cigarettes in Indian country are exempt from the state cigarette tax; however, these sales must comply with WAC 458-20-192. Other consumers may purchase cigarettes for their personal consumption from "qualified Indian

retailers" without incurring liability for state cigarette tax. A "qualified Indian retailer" is one who is subject to the terms of a valid cigarette tax contract with the state pursuant to RCW 43.06.455.

(ii) Consumers who purchase cigarettes from Indian retailers who are not subject to a cigarette tax contract with the state must comply with the reporting requirements and remit the cigarette tax as explained in subsection (602) of this rule. These consumers are also liable for the use tax on their purchases. See WAC 458-20-178.

(iii) It is the duty of the consumer in each instance to ascertain his or her responsibilities with respect to such purchases.

(d) **Cigarettes purchased on military reservations.** Active duty or retired military personnel, and their dependants, may purchase cigarettes for their own consumption on military reservations without paying the state tax (see Part III). However, such persons are not permitted to give or resell those cigarettes to others.

(e) **Counterfeit cigarettes.** It is unlawful for any person to manufacture, sell, or possess counterfeit cigarettes. A cigarette is counterfeit if (i) it or its packaging bears any logo or marking used by a manufacturer to identify its own cigarettes, and (ii) the cigarette was not manufactured by the owner of that logo or trademark or by any authorized licensee of the manufacturer. RCW 82.24.570.

(f) Possession of unstamped and untaxed cigarettes, and possession of counterfeit cigarettes, are criminal offenses in this state. See Part VI.

Part II - Stamping and Rates

(201) Cigarette stamps.

(a) Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted as explained in Part III of this rule. The stamp must be applied to the smallest container or package, unless the department, in its sole discretion, determines that it is impractical to do so. Stamps must be of the type authorized by the department and affixed in such a manner that they cannot be removed from the package or container without being mutilated or destroyed.

(b) Licensed wholesalers may purchase state-approved cigarette stamps from authorized banks. Payment for stamps must be made at the time of purchase unless the wholesaler has prior approval of the department to defer payment and furnishes a surety bond equal to the proposed monthly credit limit. Payments under a deferred plan are due within thirty days following purchase. Licensed wholesalers are compensated for affixing the stamps at the rate of \$6.00 per thousand stamps affixed ("stamping allowance").

(202) Rates.

(a) The Washington state cigarette tax is imposed on a per cigarette basis. The rate of the tax is a combination of statutory rates found in RCW 82.24.020, 82.24.027, and 82.24.028.

(b) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed cigarettes after the rate increase is liable for the additional tax.

(203) **Refunds.** Any person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department. Documentation supporting the claim must be provided at the time the claim for refund is made.

(a) Refunds for stamped untaxed cigarettes sold to Indian tribal members or tribal entities in the full value of the stamps affixed will be approved by an agent of the department.

(b) Refunds for stamped cigarettes will not include the stamping allowance if the stamps are:

- (i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor; or
- (ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improperly removed from the stamp roll.

(c) The claim for refund must be filed on a form provided by the department. An affidavit or a certificate from the manufacturer for stamped cigarettes returned to the manufacturer for destruction or by an agent of the department verifying the voiding of stamps and authorizing the refund must accompany the claim for refund.

Part III - Exemptions

(301) **In general.** There are limited exemptions from the cigarette tax provided by law. This part discusses exemptions and

the procedures that must be followed to qualify for an exemption:

(302) **Government sales.** The cigarette tax does not apply to the sale of cigarettes to:

(a) The United States Army, Navy, Air Force, Marine Corps, or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores;

(b) The United States Veteran's Administration; or

(c) Any person authorized to purchase from the federal instrumentalities named in (a) or (b) above, if the cigarettes are purchased from the instrumentality for personal consumption.

(303) **Sales in Indian country.**

(a) The definitions of "Indian," "Indian country," and "Indian tribe," in WAC 458-20-192 apply to this rule. "Cigarette contract" means an agreement under RCW 43.06.450 through 43.06.460.

(b) The cigarette tax does not apply to cigarettes taxed by an Indian tribe in accordance with a cigarette contract under RCW 43.06.450 through 43.06.460.

(c) The cigarette tax does not apply to cigarettes sold to an Indian in Indian country for personal consumption; however, those sales must comply with the allocation provisions of WAC 458-20-192. Sales made by an Indian cigarette outlet to nontribal members are subject to the tax, except as provided in (b) above.

(d) See WAC 458-20-192 for information on making wholesale sales of cigarettes to Indians and Indian tribes.

(304) **Interstate commerce.** The cigarette tax does not apply to cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to the buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to the buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales or in making sales to the federal government must furnish a surety bond in a sum equal to twice the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing cigarette stamps. The unstamped stock must be kept separate and apart from any stamped stock.

Part IV - Transporting Cigarettes in Washington

(401) **Transportation of cigarettes restricted.** No person other than a licensed wholesaler may transport unstamped cigarettes in this state except as specifically set forth in RCW 82.24.250 and this rule, or as may be allowed under a cigarette tax contract subject to the provisions of RCW 43.06.455. Licensed wholesalers transporting unstamped cigarettes in this state must do so only in their own vehicles unless they have given prior notice to the liquor control board of their intent to transport unstamped cigarettes in a vehicle belonging to another person.

(402) **Notice required.** Persons other than licensed wholesalers intending to transport unstamped cigarettes in this state must first give notice to the liquor control board of their intent to do so.

(403) **Transportation of unstamped cigarettes.** All persons transporting unstamped cigarettes must have in their actual possession invoices or delivery tickets for such cigarettes. The invoices or delivery tickets must show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes transported. It is the duty of the person responsible for the delivery or transport of the cigarettes to ensure that all drivers, agents, or employees have the delivery tickets or invoices in their actual possession for all such shipments.

(404) **Consignment.** If the cigarettes transported pursuant to subsection (401), (402), or (403) of this rule are consigned to or purchased by any person in this state, that purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

(405) **Out-of-state shipments.** Licensed wholesalers shipping cigarettes to a point outside Washington or to a federal instrumentality must, at the time of shipping or delivery, report the transaction to the department. The report must show both (a) complete details of the sale or delivery, and (b) whether stamps have been affixed to the cigarettes.

The report may be made either by submitting a duplicate invoice or by completing a form provided by the department, and must be filed with the department as set forth in subsection (602) of this rule.

(406) **Compliance required.** No person may possess or transport cigarettes in this state unless the cigarettes have been properly stamped or that person has fully complied with the requirements of RCW 82.24.250 and this rule. Failure to comply with the requirements of RCW 82.24.250 is a criminal act. Cigarettes in the possession of persons who have failed to comply are deemed contraband and are subject to seizure and forfeiture under RCW 82.24.130.

Part V - Delivery Sales of Cigarettes

(501) **Definitions.** The definitions in this subsection apply throughout this rule.

(a) **"Delivery sale"** means any sale of cigarettes to a consumer in the state where either: (i) The purchaser submits an order for a sale by means of a telephonic or other method of voice transmission, mail delivery, any other delivery service, or the internet or other online service; or (ii) the cigarettes are delivered by use of mail delivery or any other delivery service. A sale of cigarettes made in this manner is a delivery sale regardless of whether the seller is located within or outside the state. (For example, "Royal Tax-free Smokes," located in the state of Vermont, offers sales via the internet and a toll-free telephone number, and ships its products to consumers in this state. These transactions are delivery sales.) A sale of cigarettes not for personal consumption to a person who is a wholesaler licensed under chapter 82.24 RCW or a retailer licensed under chapter 82.24 RCW is not a delivery sale.

(b) **"Delivery service"** means any private carrier engaged in the commercial delivery of letters, packages, or other containers, that requires the recipient of that letter, package, or container to sign to accept delivery.

(502) **Tax liability.** Cigarettes delivered in this state pursuant to a delivery sale are subject to tax as provided in Part I of this rule. Persons making delivery sales in this state are required to provide prospective consumers with notice that the sales are subject to tax pursuant to chapters 82.24 and 82.12 RCW, with an explanation of how the tax has been or is to be paid with respect to such sales.

(503) **Additional requirements.** Persons making delivery sales of cigarettes in this state must comply with all the provisions of chapter 70.155 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.130.

Part VI - Enforcement and Administration

(601) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained. RCW 82.24.090. These records may be combined with those required in connection with the tobacco products tax (see WAC 458-20-185), if there is a segregation therein of the amounts involved. All records must be preserved for five years from the date of the transaction.

(602) **Reports and returns.** The department may require any person dealing with cigarettes in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes.

(a) Manufacturers and wholesalers selling stamped, unstamped, or untaxed cigarettes must submit a complete record of sales of cigarettes in this state monthly. This report is due no later than the fifteenth day of the calendar month and must include all transactions occurring in the previous month.

(b) Persons making sales of tax-exempt cigarettes to Indian tribes or Indian retailers pursuant to WAC 458-20-192 (9)(a) must transmit a copy of the invoice for each such sale to the special programs division of the department prior to shipment.

(c) Wholesalers selling stamped cigarettes manufactured by nonparticipating manufacturers as defined in WAC 458-20-264 must report all such sales to the special programs division no later than the twenty-fifth day of the calendar month and must include all transactions occurring in the previous month.

(d) Persons making sales of cigarettes into this state to other than a licensed wholesaler or retailer must file a report as required under Title 15, Chapter 10A, section 376 of the U.S. Code (commonly referred to as the "Jenkins Act" report). This report is due no later than the 10th day of each calendar month and must include all transactions occurring in the previous month.

(e) Persons shipping or delivering any cigarettes to a point outside of this state must submit a report showing full and complete details of the interstate sale or delivery as set forth in Part V of this rule. This report is due no later than the fifteenth day of the calendar month immediately following the shipment or delivery.

(f) Persons giving away unstamped cigarettes for advertising, promotional, or any other purpose, must report and pay the tax on the number of cigarettes distributed in this state.

(g) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the tax when they first bring the cigarettes into this state or first possess them in this state. The tax is paid with a "Tax Declaration for Cigarettes," which may be obtained from the department.

(603) **Criminal provisions.** Chapter 82.24 RCW prohibits certain activities with respect to cigarettes. Persons handling cigarettes within this state must refer to these statutes. The prohibited activities include, but are not limited to, the following:

(a) **Transportation, possession, or receiving 10,000 or fewer cigarettes.** Transportation, possession or receiving 10,000 or fewer unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a gross misdemeanor. RCW 82.24.110 (1)(n).

(b) **Transportation, possession, or receiving more than 10,000 cigarettes.** Transportation, possession, or receiving more than 10,000 unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a felony. RCW 82.24.110(2).

(c) **Forgery or counterfeiting of stamps.** Alteration, fabrication, forgery, and counterfeiting of stamps are felonies. RCW 82.24.100.

(d) **Counterfeit cigarettes.** The manufacture, sale, or possession of counterfeit cigarettes in this state is a felony. RCW 82.24.570.

(604) **Search, seizure, and forfeiture.** The department or the liquor control board may search for, seize, and subsequently dispose of unstamped cigarette packages and containers, counterfeit cigarettes, conveyances of all kinds (including aircraft, vehicles, and vessels) used for the transportation of unstamped and/or counterfeit cigarettes, and vending machines used for the sale of unstamped and/or counterfeit cigarettes. See RCW 82.24.130, et seq., for provisions relating to search, seizure, and forfeiture of property, possible redemption of property, and for treatment of such property in the absence of redemption.

(605) **Penalties.** RCW 82.24.120 provides a penalty for failure to affix the cigarette stamps or to cause the stamps to be affixed as required, or to pay any tax due under chapter 82.24 RCW. In addition to the tax deemed due, a penalty equal to the greater of \$10.00 per package of unstamped cigarettes or \$250.00 will be assessed. Interest is also assessed on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment. The department may, in its sole discretion, cancel all or part of the penalty for good cause.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). 10-10-033, § 458-20-186, filed 4/26/10, effective 5/27/10; 07-04-119, § 458-20-186, filed 2/7/07, effective 3/10/07. Statutory Authority: RCW 82.24.235, 82.32.300, and 82.01.060(1). 05-02-035, § 458-20-186, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.32.300. 94-10-062, § 458-20-186, filed 5/3/94, effective 6/3/94; 90-24-036, § 458-20-186, filed 11/30/90, effective 1/1/91; 90-04-039, § 458-20-186, filed 1/31/90, effective 3/3/90; 87-19-007 (Order ET 87-5), § 458-20-186, filed 9/8/87; 83-07-032 (Order ET 83-15), § 458-20-186, filed 3/15/83; Order ET 75-1, § 458-20-186, filed 5/2/75; Order ET 73-2, § 458-20-186, filed 11/9/73; Order ET 71-1, § 458-20-186, filed 7/22/71; Order ET 70-3, § 458-20-186 (Rule 186), filed 5/29/70, effective 7/1/70.]

APPENDIX “J”

WAC 458-20-192

WAC 458-20-192
Indians — Indian country.
(1) **Introduction.**

(a) Under federal law the state may not tax Indians or Indian tribes in Indian country. In some instances the state's authority to impose tax on a nonmember doing business in Indian country with an Indian or an Indian tribe is also preempted by federal law. This rule only addresses those taxes administered by the department of revenue (department).

(b) The rules of construction used in analyzing the application of tax laws to Indians and nonmembers doing business with Indians are:

- (i) Treaties are to be construed in the sense in which they would naturally have been understood by the Indians; and
- (ii) Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

(c) This rule reflects the harmonizing of federal law, Washington state tax law, and the policies and objectives of the Centennial Accord and the Millennium Agreement. It is consistent with the mission of the department of revenue, which is to achieve equity and fairness in the application of the law.

(d) It is the department's policy and practice to work with individual tribes on a government-to-government basis to discuss and resolve areas of mutual concern.

(2) **Definitions.** The following definitions apply throughout this rule:

(a) "Indian" means a person on the tribal rolls of an Indian tribe. A person on the tribal rolls is also known as an "enrolled member" or a "member" or an "enrolled person" or an "enrollee" or a "tribal member."

(b) "Indian country" has the same meaning as given in 18 U.S.C. 1151 and means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

(c) "Indian tribe" means an Indian nation, tribe, band, community, or other entity recognized as an "Indian tribe" by the United States Department of the Interior. The phrase "federally recognized Indian tribe" and the term "tribe" have the same meaning as "Indian tribe."

(d) "Indian reservation" means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the use and occupancy of Indian tribes by treaty, law, or executive order and that are areas currently recognized as "Indian reservations" by the United States Department of the Interior. The term includes lands within the exterior boundaries of the reservation owned by non-Indians as well as land owned by Indians and Indian tribes and it includes any land that has been designated "reservation" by federal act.

(e) "Nonmember" means a person not on the tribal rolls of the Indian tribe.

(f) "State sales and use tax" includes local sales and use tax.

(3) **Federally recognized Indian tribes.** As of the effective date of this rule there are twenty-eight federally recognized Indian tribes in the state of Washington. You may contact the governor's office of Indian affairs for an up-to-date list of federally recognized Indian tribes in the state of Washington at its web site, www.goia.wa.gov or at:

Governor's Office of Indian Affairs

531 15th Ave. S.E.

P.O. Box 40909

Olympia, WA 98504-0909

360-753-2411

(4) **Recordkeeping.** Taxpayers are required to maintain appropriate records on the tax exempt status of transactions. For

example, in the case of the refuse collection tax, the refuse collection company must substantiate the tax-exempt status of its customers. This could be done, for example, one of two ways. The tribe can provide the refuse collection company with a list of all of the tribal members living in Indian country or the individual members can provide exemption certificates to the company. A buyer's retail sales tax exemption certificate that can be used for this purpose is located on the department's web site (www.dor.wa.gov/forms/other.htm) or may be obtained by contacting the department. The company must then keep the list or the certificates in its files as proof of the tax exempt status of the tribe and its members. Individual businesses may contact the department to determine how best to keep records for specific situations.

(5) Enrolled Indians in Indian country. Generally. The state may not tax Indians or Indian tribes in Indian country. For the purposes of this rule, the term "Indian" includes only those persons who are enrolled with the tribe upon whose territory the activity takes place and does not include Indians who are members of other tribes. An enrolled member's spouse is considered an "Indian" for purposes of this rule if this treatment does not conflict with tribal law. This exclusion from tax includes all taxes (e.g., B&O tax, public utility tax, retail sales tax, use tax, cigarette tax). If the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or the activity is treaty fishing rights related activity (see subsection (6)(b) of this rule). "Incidence" means upon whom the tax falls. For example, the incidence of the retail sales tax is on the buyer.

(a)(i) Retail sales tax - tangible personal property - delivery threshold. Retail sales tax is not imposed on sales to Indians if the tangible personal property is delivered to the member or tribe in Indian country or if the sale takes place in Indian country. For example, if the sale to the member takes place at a store located on a reservation, the transaction is automatically exempt from sales tax and there is no reason to establish "delivery."

(ii) Retail sales tax - services. The retail sales tax is not imposed if the retail service (e.g., construction services) is performed for the member or tribe in Indian country. In the case of a retail service that is performed both on and off Indian country, only the portion of the contract that relates to work done in Indian country is excluded from tax. The work done for a tribe or Indian outside of Indian country, for example road work that extends outside of Indian country, is subject to retail sales tax.

(b) Use tax. Use tax is not imposed when tangible personal property is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(c) Tax collection. Generally, sales to persons other than Indians are subject to the retail sales tax irrespective of where in this state delivery or rendition of services takes place. Sellers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them to nonmembers in Indian country. A tribe and the department may enter into an agreement covering the collection of state tax by tribal members or the tribe. (See also the discussion regarding preemption of tax in subsection (7) of this rule.)

In order to substantiate the tax-exempt status of a retail sale to a person who is a tribal member, unless the purchaser is personally known to the seller as a member, the seller must require presentation of a tribal membership card or other suitable identification of the purchaser as an enrollee of the Indian tribe. A tribe and the department may enter into an agreement covering identification of enrolled members, in which case the terms of the agreement govern.

A person's tax status under the Revenue Act does not change simply because he or she is making a tax-exempt sale to a tribe or tribal member. For example, a person building a home for a nonmember/consumer is entitled to purchase subcontractor services and materials to be incorporated into the home at wholesale. See RCW 82.04.050. A person building a home for a tribal member/consumer in Indian country is similarly entitled to purchase these services and materials at wholesale. The fact that the constructing of the home for the tribal member/consumer is exempt from retail sales tax has no impact on the taxability of the purchases of materials, and the materials continue to be purchased for resale.

(d) Corporations or other entities owned by Indians. A state chartered corporation comprised solely of Indians is not subject to tax on business conducted in Indian country if all of the owners of the corporation are enrolled members of the tribe except as otherwise provided in this section. The corporation is subject to tax on business conducted outside of Indian country, subject to the exception for treaty fishery activity as explained later in this rule. Similarly, partnerships or other entities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. In the event that the composition includes a family member who is not a member of the tribe, for instance a business comprised of a mother who is a member of the Chehalis Tribe and her son who is a member of the Squaxin Island Tribe, together doing business on the Chehalis reservation, the business will be considered as satisfying the "comprised solely" criteria if at least half of the owners are enrolled members of the tribe.

(6) Indians outside Indian country.

(a) Generally. Except for treaty fishery activity, Indians conducting business outside of Indian country are generally subject to tax (e.g., the B&O, the public utility tax, retail sales tax). Indians or Indian tribes who conduct business outside Indian country must register with the department as required by RCW 82.32.030. (See also WAC 458-20-101 for more registration information.)

(b) Treaty fishery - preemption. For the purpose of this rule, "treaty fishery" means the fishing and shellfish rights

preserved in a tribe's treaty, a federal executive order, or an act of Congress. It includes activities such as harvesting, processing, transporting, or selling, as well as activities such as management and enforcement.

(i) **Indians - B&O tax.** The gross income directly derived from treaty fishing rights related activity is not subject to state tax. This exclusion from tax is limited to those businesses wholly owned and operated by Indians/tribe who have treaty fishing rights. If a business wholly owned and operated by Indians/tribe deals with both treaty and nontreaty fish, this exclusion from tax is limited to the business attributable to the treaty fish. "Wholly owned and operated" includes entities that meet the qualifications under 26 U.S.C. 7873, which requires that:

(A) Such entity is engaged in a fishing rights-related activity of such tribe;

(B) All of the equity interests in the entity are owned by qualified Indian tribes, members of such tribes, or their spouses;

(C) Except as provided in the code of federal regulations, in the case of an entity which engages to any extent in any substantial processing or transporting of fish, ninety percent or more of the annual gross receipts of the entity is derived from fishing rights-related activities of one or more qualified Indian tribes each of which owns at least ten percent of the equity interests in the entity; and

(D) Substantially all of the management functions of the entity are performed by members of qualified Indian tribes.

(ii) **Indians - sales and use tax.** The retail sales tax and use tax do not apply to the services or tangible personal property for use in the treaty fishery, regardless of where delivery of the item or performance of the service occurs. Gear, such as boats, motors, nets, and clothing, purchased or used by Indians in the treaty fishery is not subject to sales or use tax. Likewise, retail services in respect to property used in the treaty fishery, such as boat or engine repair, are not subject to sales tax.

(iii) **Sales to nonmembers.** Treaty fish and shellfish sold by members of the tribe are not subject to sales tax or use tax, regardless of where the sale takes place due to the sales and use tax exemption for food products.

(iv) **Government-to-government agreement.** A tribe and the department may enter into an agreement covering the treaty fishery and taxable activities of enrolled members, in which case the terms of the agreement govern.

(7) **Nonmembers in Indian country - preemption of state tax.** Generally, a nonenrolled person doing business in Indian country is subject to tax. Unless specifically described as preempted by this rule, the department will review transactions on a case-by-case basis to determine whether tax applies. A nonmember who is not taxable on the basis of preemption should refer to WAC 458-20-101 (tax registration) to determine whether the person must register with the department.

(a) **Preemption of tax on nonmembers - gaming.** Gaming by Indian tribes is regulated by the federal Indian Gaming Regulatory Act. Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country. This exclusion from tax applies to taxes imposed on income attributable to the business activity (e.g., the B&O tax), and to sales and use tax on the property used in Indian country to conduct the activity. Sales tax will apply if delivery of property is taken outside of Indian country.

Nonmembers who purchase tangible personal property at a gaming facility are subject to retail sales or use tax, unless:

(i) The item is preempted based on the outcome of the balancing test. For example, depending on the relative state, tribal, and federal interests, tax on food at restaurants or lounges owned and operated by the tribe or a tribal member or sales of member arts and crafts at gift shops might be preempted. See the balancing test discussion in subsection (c) below; or

(ii) The item is purchased for use in the gaming activity at the facility, such as bingo cards or daubers.

(b) **Preemption of B&O and public utility tax - sales of tangible personal property or provision of services by nonmembers in Indian country.** As explained in this subsection, income from sales in Indian country of tangible personal property to, and from the performance of services in Indian country for, tribes and tribal members is not subject to B&O (chapter 82.04 RCW) or public utility tax (chapters 82.16 and 54.28 RCW). The taxpayer is responsible for maintaining suitable records so that the taxpayer and the department can distinguish between taxable and nontaxable activities.

(i) **Sales of tangible personal property.** Income from sales of tangible personal property to the tribe or to tribal members is not subject to B&O tax if the tangible personal property is delivered to the buyer in Indian country and if:

(A) The property is located in Indian country at the time of sale; or

(B) The seller has a branch office, outlet, or place of business in Indian country that is used to receive the order or distribute the property; or

(C) The sale of the property is solicited by the seller while the seller is in Indian country.

(ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is

not subject to the B&O or public utility tax. Services performed outside of Indian country are subject to tax. In those instances where services are performed both on and off of Indian country, the activity is subject to state tax to the extent that services are substantially performed outside of Indian country.

(A) It will be presumed that a professional service (e.g., accounting, legal, or dental) is substantially performed outside of Indian country if twenty-five percent or more of the time taken to perform the service occurs outside of Indian country. The portion of income subject to state tax is determined by multiplying the gross receipts from the activity by the quotient of time spent outside of Indian country performing the service divided by total time spent performing the service.

For example, an accountant with an office outside of Indian country provides accounting services to a tribal member. The accountant performs some of the work at the office and some work at the business of the tribal member in Indian country. If at least twenty-five percent of the time performing the work is spent outside of Indian country, the services are substantially performed outside of Indian country and therefore a portion is subject to state tax. As explained above, the accountant must maintain suitable records to distinguish between taxable and nontaxable income in order to provide for a reasonable approximation of the amount of gross income subject to B&O tax. In this case, suitable records could be a log of the time and location of the services performed for the tribal matter by the accountant, his or her employees, and any contractors hired by the accountant.

(B) For services subject to the retailing and/or wholesaling B&O tax (e.g., building, installing, improving, or repairing structures or tangible personal property), the portion of income relative to services actually performed outside of Indian country is subject to state tax.

For example, a contractor enters into a contract with a tribe to install a sewer line that extends off reservation. Only the income attributable to the installation of the portion of the sewer line off reservation is subject to state tax.

(C) For public utility services under chapters 82.16 and 54.28 RCW it will be presumed that the service is provided where the customer receives the service.

(c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** In certain instances state sales and use tax may be preempted on nonmembers who purchase goods or services from a tribe or tribal members in Indian country. The U.S. supreme court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. See *Salt River Pima-Maricopa Indian Community v. Waddell*, 50 F.3d 734, (1995). This analysis is known as the "balancing test." This preemption analysis does not extend to subsequent transactions, for example if the purchaser buys for resale the tax imposed on the consumer in the subsequent sale is not preempted. However, because these balancing test determinations are so fact-based, the department will rule on these issues on a case-by-case basis. For such a ruling please contact the department at:

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(d) **Federal contractors.** The preemption analysis does not extend to persons who are doing work for the federal government in Indian country. For example, a nonmember doing road construction for the Bureau of Indian Affairs within an Indian reservation is subject to state tax jurisdiction.

(e) **Indian housing authorities.** RCW 35.82.210 provides that the property of housing authorities and the housing authorities themselves are exempt from taxes, such as state and local sales and use taxes, state and local excise taxes, state and local property taxes, and special assessments. This covers tribal housing authorities and intertribal housing authorities both on and off of Indian land. Please note that tribal housing authorities, like all other housing authorities, are exempt from tax anywhere in the state, and the delivery requirement and other geographic thresholds are not applicable.

Not all assessments are exempted under RCW 35.82.210. See *Housing Authority of Sunnyside v. Sunnyside Valley Irrigation District*, 112 Wn2d 262 (1989).

For the purposes of the exemption:

(i) "Intertribal housing authority" means a housing authority created by a consortium of tribal governments to operate and administer housing programs for persons of low income or senior citizens for and on behalf of such tribes.

(ii) "Tribal government" means the governing body of a federally recognized Indian tribe.

(iii) "Tribal housing authority" means the tribal government or an agency or branch of the tribal government that operates

and administers housing programs for persons of low income or senior citizens.

(8) **Motor vehicles, trailers, snowmobiles, etc., sold to Indians or Indian tribes.** Sales tax is not imposed when a motor vehicle, trailer, snowmobile, off-road vehicle, or other such property is delivered to an Indian or the tribe in Indian country or if the sale is made in Indian country. Similarly, use tax is not imposed when such an item is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(a) **Registration of vehicle, trailer, etc.** County auditors, subagencies appointed under RCW 46.01.140, and department of licensing vehicle licensing offices must collect use tax when Indians or Indian tribes apply for an original title transaction or transfer of title issued on a vehicle or vessel under chapters 46.09, 46.10, 46.12, or 88.02 RCW unless the tribe/Indian shows that they are not subject to tax. To substantiate that they are not subject to tax the Indian/tribe must show that they previously paid retail sales or use tax on their acquisition or use of the property, or that the property was acquired on or delivered to Indian country. The person claiming the exclusion from tax must sign a declaration of delivery to or acquisition in Indian country. A statement in substantially the following form will be sufficient to establish eligibility for the exclusion from sales and use tax.

(b) **Declaration.**

DECLARATION OF DELIVERY OR ACQUISITION IN INDIAN COUNTRY

The undersigned is (circle one) an enrolled member of the tribe/authorized representative of the tribe or tribal enterprise, and the property was delivered/acquired within Indian country, for at least partial use in Indian country.

name of buyer

date of delivery/acquisition

address of delivery/acquisition

(9) **Miscellaneous taxes.** The state imposes a number of excise taxes in addition to the most common excise taxes administered by the department (e.g., B&O, public utility, retail sales, and use taxes). The following is a brief discussion of some of these taxes.

(a) **Cigarette tax.** The statutory duties applicable to administration and enforcement of the cigarette tax are divided between the department and the liquor control board. Enforcement of nonvoluntary compliance is the responsibility of the liquor control board. Voluntary compliance is the responsibility of the department of revenue. See chapter 82.24 RCW for specific statutory requirements regarding purchase of cigarettes by Indians and Indian tribes. For a specific ruling regarding the taxability of and stamping requirements for cigarettes manufactured by Indians or Indian tribes in Indian country, please contact the department at:

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Where sales of cigarettes are the subject of a government-to-government cooperative agreement, the provisions of that agreement supersede conflicting provisions of this subsection.

(i) Sales of cigarettes to nonmembers by Indians or Indian tribes are subject to the cigarette tax. The wholesaler is obligated to make precollection of the tax. Therefore, Indian or tribal sellers making sales to non-Indian customers must (A) purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales or (B) they may make purchases of cigarettes from licensed cigarette distributors for resale to qualified purchasers or (C) may purchase a stock of untaxed unstamped cigarettes for resale to qualified purchasers if the tribal seller gives advance notice under RCW 82.24.250 and Rule 186.

For purposes of this rule, "qualified purchaser" means an Indian purchasing for resale within Indian country to other Indians or an Indian purchasing solely for his or her use other than for resale.

(ii) Delivery or sale and delivery by any person of stamped exempt cigarettes to Indians or tribal sellers for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the seller. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the seller's place of business, records indicating the percentage of such trade that

has historically been realized by the seller, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of stamped exempt cigarettes to Indian country or to any Indian or tribal seller thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the resident enrolled membership of the affected tribe.

(iii) Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal seller without advance notice to the department will result in the treatment of those cigarettes as contraband and subject to seizure. In addition, the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. See chapter 82.24 RCW.

Approval for sale or delivery to Indian or tribal sellers of stamped exempt cigarettes will be denied where the department finds that such Indian or tribal sellers are or have been making sales in violation of this rule.

(iv) Delivery of stamped exempt cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to Indian country. Delivery of stamped exempt cigarettes outside of Indian country at the distributor's dock or place of business or any other location outside of Indian country is prohibited unless the cigarettes are accompanied by an invoice.

(b) **Refuse collection tax.** Indians and Indian tribes are not subject to the refuse collection tax for service provided in Indian country, regardless of whether the refuse collection company hauls the refuse off of Indian country.

(c) **Leasehold excise tax.** Indians and Indian tribes in Indian country are not subject to the leasehold excise tax. Leasehold interests held by nonenrolled persons are subject to tax.

(d) **Fish tax.** Chapter 82.27 RCW imposes a tax on the commercial possession of enhanced food fish, which includes shellfish. The tax is imposed on the fish buyer. The measure of the tax is the value of the enhanced food fish at the point of landing. A credit is allowed against the amount of tax owed for any tax previously paid on the same food fish to any legally established taxing authority, which includes Indian tribes. Transactions involving treaty fish are not subject to the fish tax, regardless of where the transaction takes place.

(e) **Tobacco tax.** The tobacco tax is imposed on "distributors" as that term is defined in RCW 82.26.010. Tobacco tax is not imposed on Indian persons or tribes who take delivery of the tobacco in Indian country. Effective July 1, 2002, persons who handle for sale any tobacco products that are within this state but upon which tax has not been imposed are subject to the tobacco tax. Chapter 325, Laws of 2002. Thus, persons purchasing tobacco products for resale from Indians who are exempt from the tobacco tax are subject to tobacco tax on the product. See WAC 458-20-185, Tax on tobacco products.

(f) **Real estate excise tax.** The real estate excise tax is imposed on the seller. A sale of land located in Indian country by a tribe or a tribal member is not subject to real estate excise tax. A sale of land located within Indian country by a nonmember to the tribe or to a tribal member is subject to real estate excise tax.

(g) **Timber excise tax.** Payment of the timber excise tax is the obligation of the harvester. The tribe or tribal members are not subject to the timber excise tax in Indian country. Generally, timber excise tax is due from a nonmember who harvests timber on fee land within Indian country. Timber excise tax is not due if the timber being harvested is on trust land or is owned by the tribe and located in Indian country, regardless of the identity of the harvester. There are some instances in which the timber excise tax might be preempted on non-Indians harvesting timber on fee land in Indian country due to tribal regulatory authority. For such a ruling please contact the department at:

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[Statutory Authority: RCW 82.32.300, 02-14-133, § 458-20-192, filed 7/2/02, effective 8/2/02; 00-24-050A, § 458-20-192, filed 11/30/00, effective 1/1/01; 80-17-026 (Order ET 80-3), § 458-20-192, filed 11/14/80; Order ET 76-4, § 458-20-192, filed 11/12/76; Order ET 74-5, § 458-20-192, filed 12/16/74; Order ET 70-3, § 458-20-192 (Rule 192), filed 5/29/70, effective 7/1/70.]

APPENDIX “K”

Cigarette Tax Compact between

The Quinault Nation

And

The State of Washington

CIGARETTE TAX COMPACT
between
THE QUINULT NATION
and
THE STATE OF WASHINGTON

Exhibit #1

PREAMBLE

WHEREAS, the Quinault Nation ("Tribe") is a federally recognized Indian tribe, possessed of the full inherent sovereign powers of a government;

WHEREAS, the State of Washington ("State") is a state within the United States of America, possessed of full powers of state government;

WHEREAS, the body of Federal Indian law and policy recognizes the right and the importance of self-determination for Indian tribes, the authority of a tribe to tax certain activities, and the need for economic development in Indian country by Indian tribes;

WHEREAS, the State has committed, through the Centennial Accord and Millennium Agreement, to the political integrity of the federally recognized Indian tribes within the State of Washington and has formally recognized that the sovereignty of each tribe provides paramount authority for the tribe to exist and to govern;

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over, and the taxation of, the sale and distribution of cigarettes;

WHEREAS, the State and Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of this Cigarette Tax Compact;

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Compact will enable, taxation being an essential attribute of sovereignty and a tool of self-sufficiency;

WHEREAS, the State and Tribe will also benefit by the exercise of the attributes of tribal sovereignty and from the improved well-being of members of the Tribe that will result from economic development by the Tribe and its members;

WHEREAS, both the Tribe and the State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis;

WHEREAS, the mutual interests of the Tribe and the State brought these two governments together to pursue their common interest in resolving this tax disagreement; and

WHEREAS, this Compact is authorized, on the part of the State, by legislation, including House Bill 5372, enacted by the 2001 Regular Session of the 57th Legislature and signed by the Governor, effective July 22nd, 2001, and House Bill 2553, enacted by the 2002 Regular Session of the 57th Legislature and signed by the Governor, effective June 13, 2002, as codified in

Revised Code of Washington (RCW) 43.06.450, RCW 43.06.455, RCW 43.06.460, and RCW 82.24.295; and on the part of the Tribe, by the Tribal Council and signed by the Tribal Chairman.

NOW THEREFORE, the Tribe by and through its Tribal Council; and the State by and through its Governor, do hereby enter into this Compact for the mutual benefit of the Tribe and the State. To wit:

PART I - DEFINITIONS

1. "Auditor" means an independent third party auditor selected pursuant to Part VIII of this Compact.
2. "Allocation" means the number of cigarettes available to be sold to Indians free of all state cigarette and sales taxes. It is based on a formula that includes consumption data and tribal service area population.
3. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
4. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.
5. "Compact" means this agreement entered into by the State and the Tribe.
6. "Department" means the Washington State Department of Revenue.
7. "Essential government services" means services provided by the Tribe including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
8. "Indian country," consistent with the meaning given in 18 United States Code (U.S.C.) section 1151, includes:
 - (a) All land within the limits of the Quinault Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation.
 - (b) All lands placed in trust or restricted status for individual member Indians or for the Tribe, and such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

- (c) All Indian allotments or other lands held in trust for a tribal member or the Tribe, the Indian titles to which have not been extinguished, including rights of way running through the same.
9. "Quinault Reservation" or "Reservation" means the area recognized as the Quinault Reservation by the United States Department of the Interior.
 10. "Liquor Control Board" is an agency of the State with a mission to prevent the misuse of alcohol and tobacco through education, enforcement, and controlled distribution.
 11. "Local retail sales tax" means the combined Washington local retail sales and use taxes applicable in the area.
 12. "Non-Indian" means an individual who is neither a Quinault tribal member nor a nonmember Indian.
 13. "Nonmember Indian" means an enrolled member of a federally recognized Indian tribe other than the Quinault Nation.
 14. "Parties to the agreement" or "parties" means the Tribe and the State.
 15. "Retail selling price" means the price paid by the consumer for each package or carton of cigarettes, which price includes the tribal cigarette tax.
 16. "Self-certified tribal wholesaler" means a wholesaler who is a federally recognized Indian tribe or a member of such a tribe.
 17. "State Cigarette Tax" means the state tax imposed on each cigarette, which is expressed in cents per cigarette.
 18. "State and Local Retail Sales and Use Taxes" means taxes levied by the State or by local units of government and expressed as a percentage of the sales price (which includes the State Cigarette Tax) of a unit of cigarettes.
 19. "State Taxes" in this compact only, means a combination of the "State Cigarette Tax," and the "state and local retail sales and use taxes."
 20. "State" means the State of Washington.
 21. "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco products" does not include cigarettes.

22. "Tribal member" means an enrolled member of the Quinault Nation.
23. "Tribal retailer" means a cigarette retailer wholly owned by the Quinault Nation and located in Indian country or a member-owned smokeshop located in Indian country and licensed by the Tribe.
24. "Tribal cigarette tax" means the tax or taxes enacted as a provision of Tribal law on the units of cigarettes sold and on the purchase of cigarettes by retail buyers.
25. "Tribal tax stamp" means the stamp or stamps that indicate the taxes imposed under this Compact have been paid or that identify those cigarettes with respect to which no tax or another tribal tax is imposed.
26. "Tribe" or "tribal" means or refers to the Quinault Nation, a federally recognized tribe.
27. "Wholesaler" means every person who purchases, sells, or distributes cigarettes for the purpose of resale.

PART II - APPLICABILITY OF THE COMPACT

1. **Execution of Compact**
This Compact shall become effective when approved by both the Tribal Council as indicated by the signature of the tribal Chairman, and by the State when signed by the Governor. This Compact shall be executed in duplicate originals, with each party retaining one fully executed duplicate original of the Compact.
2. **Application**
From its execution, and contingent upon the imposition of the tribal cigarette tax pursuant to a tribal law meeting the terms of Part III of this Compact, this Compact shall apply to the retail sale of cigarettes by tribal retailers. Sales subject to the tribal Cigarette Tax imposed pursuant to this Compact are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. If the Tribe desires to pursue mail order and/or internet sales of Cigarettes, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the taxation of such sales.
3. **Scope Limited**
This Compact does not apply to: (a) cigarettes sold at retail by non-Indians or nonmember Indians; (b) tobacco products as that term is defined in Part I of this compact; or (c) cigarettes manufactured by the Tribe or its enterprises within Indian country.

PART III - IMPOSITION OF TRIBAL CIGARETTE TAXES

1. Tribal Retailers

- a. The Tribe agrees to inform the Department regarding the startup of cigarette sales by any tribal retailer who begins selling cigarettes after the effective date of this Compact. At the time of the execution of this Compact, the Tribe makes sales of cigarettes at its Taholah Store, its Queets Store, and at the Quinalt Beach Resort and Casino.
- b. The Tribe agrees that any cigarette retailer wholly owned by Tribe is subject to this Compact.
- c. The Tribe agrees that it will require any member-owned smokeshop located in Indian country to be in compliance with the terms of this Compact. In addition the Tribe agrees that it will maintain and enforce a requirement that any such member-owned smokeshop obtain a license from the Tribe and that a condition of such license is access of the Department to observe sales pursuant to section 1 of Part X of this Compact. The State agrees that it is entirely within the discretion of the Tribe as to whether it allows retail sales of cigarettes by its members.
- d. The Tribe agrees to enact ordinances regarding Auditor access to records of tribal members selling cigarettes in Indian Country, should the Tribe elect to allow retail sales of cigarettes by its members.

2. Tax Imposed on Sales by Tribal Retailers:

The Tribe, by law and in accord with the requirements of this Part, shall impose taxes on all sales by tribal retailers of cigarettes to purchasers within Indian country. The Tribe may allow for an exemption from such taxes for Tribal members, under Part V section 1 of this Compact.

Beginning no sooner than the date this compact is signed by both parties, and subject to enactment or revision of a tribal law authorizing the imposition of a tax on cigarettes, the Tribe shall impose and maintain in effect a tax on retail sales of cigarettes equal to 80% of the state taxes.

No later than 36 months after the initial imposition of a tax under this Compact and subject to the phase-in reduction under this part, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equal to 100% of the state taxes.

If during any quarter, the number of cartons of cigarettes, excluding those manufactured by the Tribe or its enterprises, that are sold at retail exceeds by at least 10 percent the quarterly average sales of the twelve month period, as specified in this section 2, the 36 month period noted above shall be reduced by three months. The Auditor shall determine the quarterly average sales baseline. The baseline shall be calculated using sales for the six months immediately preceding the imposition of tax. The Auditor shall notify the Tribe and the Department when the retail sales for any quarter exceed the baseline by at least ten percent. These reductions will be cumulative. For purposes of this provision:

- (a) "Quarter" means a three-month period, each quarter immediately succeeding the next. The first quarter begins the first day of the first month the Tribal cigarette tax is imposed, if the imposition of the tax is on or before the 15th of the month, or begins

the first day of the second month the Tribal cigarette tax is imposed, if the imposition of the tax is after the 15th of the month; and

- (b) The "quarterly average sales" means the sum of the retail sales made during the two quarters divided by two.

During the term of this Compact and upon any future increase in the state cigarette tax, the tribal tax on cigarettes shall increase by no less than 100 percent of the increase in the combined state taxes. Notwithstanding the foregoing sentence, so long as the Tribe is entitled to apply the 80 percent formula set forth above to cigarette sales, the increase in State taxes shall trigger an increase in the corresponding Tribal cigarette tax of 80 percent of the increased amount.

Upon any future decrease in the state cigarette tax, the tribal tax on cigarettes may decrease to a minimum of no less than 100 percent of the combined State taxes.

The State will notify the Tribe at least thirty (30) days prior to the effective date, in writing, of any increases or decreases in the cigarette tax or the combined state sales and use tax.

Pursuant to RCW 43.06.455(3) and RCW 82.24.295, the State retrocedes from its tax during the time this Compact is in effect, subject to the imposition of a Tribal tax. In addition, the State agrees that enforcement of this Compact shall be done in accordance with the conditions set forth in this Compact.

PART IV - PURCHASE OF CIGARETTES BY TRIBAL RETAILERS

1. Wholesale Purchases- Requirements

The Tribe agrees to add to tribal law, and maintain in effect, a requirement that the tribal retailers purchase cigarettes only from:

- (a) Wholesalers or manufacturers licensed to do business in the State;
- (b) Self-certified tribal wholesalers who meet the requirements of Part VI section 3 of this Compact; or
- (c) The Tribe or its enterprises as a tribal manufacturer or wholesaler.

2. Delivery of Cigarettes to the Tribal Retailer Outside of Indian Country

Cigarettes bearing the tax stamp required by this Compact or cigarettes purchased by the Tribe for stamping may be delivered or transferred within or outside Indian country by a wholesaler to the Tribe or a tribal retailer, subject to meeting any notification requirements of this Compact. Commercial carriers may make deliveries. Invoices identifying the delivery as cigarettes for the Quinault Nation must accompany such cigarettes.

PART V - TAX STAMPS

1. Tax Stamp Required

- (a) All cigarettes sold by tribal retailers shall bear either a Washington State Tribal Compact Stamp or a Quinault Nation tax stamp.
- (b) The Tribe may allow for an exemption from this tax for enrolled members who are over the age of 18 years. If the Tribe chooses to exempt its members from tax, the Tribe agrees to keep exact records of such sales, under section (2) of this part. The expectation of both Parties is that if the Tribe chooses to tax its members that the allocation allowance described in WAC 458-20-192 will be used as an approximation of sales to members and the Tribe will not be required to keep exact records of such sales. This allocation figure will be used to distinguish funds subject to the requirements of Part XIII section 8, from funds that are not.

2. Creation and Supply of Tax Stamps

- (a) The Tribe will use either Washington State Tribal Compact tax stamps, which are provided by the State through its stamp vendor, or tribal tax stamps. If the Tribe elects to institute its own stamp, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the use of such stamps.
- (b) If the Tribe elects to use the state tribal compact tax stamps it will purchase cigarettes with the stamp affixed after the effective date of the tribal cigarette tax, until such time as the Tribe arranges for the use of a tribal stamp. If the Tribe makes this election, the wholesaler shall obtain the stamps from the State's stamp vendor. The wholesaler shall affix the stamps to the cigarettes, sell the cigarettes to the Tribe without tax included in the price, and the Tribe in turn shall institute an accounting and pricing protocol that assures the cigarette tax is included in the price of the cigarettes. The State and the Tribe may agree to an alternative method of obtaining the stamps and accounting for tax revenue, such method to be agreed to by both parties and memorialized in writing.
- (c) If the Tribe elects to use the tribal tax stamps, the stamps will have a serial number or some other discrete identification. The Tribe agrees to purchase stamps from a nationally recognized stamp manufacturer.
- (d) The Tribe may contract with a bank or other stamp vendor to distribute tribal tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment of the applicable Tribal cigarette tax by the wholesaler or Tribal retailer, and remit the collected taxes to the Tribe. The contract shall provide that the stamp vendor shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service or some other third-party stamp vendor satisfactory to both parties. The Tribe shall require the stamp vendor to remit to the Tribe all revenue collected from the Tribal cigarette tax. The Tribe shall require that the stamp vendor provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department. The Tribe's contract with the stamp

vendor shall specify a process by which the Tribe is assured that all wholesalers who sell cigarettes to Tribal retailers are paying the applicable Tribal taxes, unless the Tribal retailer has prepaid the tax to the stamp vendor. This process may include a requirement that wholesalers agree to provide documentation such as invoices of sales to verify to the Tribe that the Tribal taxes were paid. In the alternative, the Tribe may elect to act as its own stamp vendor. Should it so desire, it must enter into a memorandum of agreement with the Department, setting forth protocols regarding security and audit. The Department agrees to not unreasonably refuse entry into said memorandum of agreement.

3. **Requirements for Affixation of Stamps by Wholesalers**

Wholesalers or the Tribe shall be responsible for affixing the tax stamps to the smallest container of cigarettes that will be sold or distributed by the tribal retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp. Stamps shall be affixed so that they may be readily viewed by inspection.

Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale or to ship to the Tribe. It is presumed that any such possession in excess of seventy-two (72) hours (excluding Saturdays, Sundays, and Holidays) is in contravention of this Compact. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.

4. **Wholesaler Obligation Under State Law**

Affixing of the tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Compact (in the case of self-certified tribal wholesalers), and compliance with other requirements in this Compact, shall be deemed to satisfy the state cigarette excise tax obligation of a wholesaler.

5. **State Agreement Regarding Compliance with State and Federal Law**

As to all transactions that conform to the requirements of this Compact, such transactions do not violate state law, and the State agrees that it will not assert that any such transaction violates state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws.

PART VI - WHOLESALERS

1. **Wholesalers Licensed by the State**

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to state tax and which cigarettes are subject to the tribal cigarette tax.

2. **Self-Certified Tribal Wholesalers**

Tribal wholesalers who are not licensed to do business within the State or any other state, and who are not required by state law to be licensed, must, prior to doing business with the

Tribe, have entered into a memorandum of agreement with the Department regarding their activities as a wholesaler in regard to (a) meeting the terms of cigarette compacts and (b) the interests of the state of Washington regarding the cigarette trade in general.

The Tribe shall require compliance with this Compact in its agreements with any such tribal wholesalers and shall provide copies of such agreements to the Auditor for its review. The contract between the Tribe and the tribal wholesaler will also include a requirement that:

- (a) Invoices detailing the quantity and brand of cigarettes destined for the Tribe will accompany the cigarettes transported in the State. Such invoices shall provide an order number that matches the order number provided under Part VII section 2 of this Compact and shall identify the seller of the cigarettes as well as the buyer of the cigarettes; and
- (b) The wholesaler will allow the Auditor access to its records for the purpose of determining whether the tax stamps for the Tribe's cigarettes are properly affixed to the cigarette containers.

A tribal wholesaler who has a memorandum of agreement with the State and who has an agreement with the Tribe, in which agreement the wholesaler agrees to abide by the terms of this Compact, shall be referred to as a "self-certified tribal wholesaler."

3. Tribe as Wholesaler

This Compact contemplates that the Tribe may, at some future date, act as its own wholesaler. In the event that the Quinault Nation decides to act as its own wholesaler in regards to sales to the tribal retailers, it agrees to first enter into a memorandum of agreement with the Department regarding this activity. The Department agrees to not unreasonably refuse entry into said memorandum of agreement. The memorandum of agreement shall reference any applicable requirements of this Compact. If the Tribe, by itself or through a tribal enterprise, manufactures and wholesales to the tribal retailers, that wholesale activity does not require a memorandum of agreement under this subsection.

4. Self Certified Wholesalers

Should the Tribe decide it wants the option of purchasing cigarettes from a self-certified wholesaler, as that term is used in RCW 43.06.455 (5)(b), it must first enter into a memorandum of agreement with the Department of Revenue governing this activity. The Department agrees to not unreasonably refuse entry into said memorandum of agreement.

PART VII - ENFORCEMENT AUTHORITY AND RESPONSIBILITY OF THE LIQUOR CONTROL BOARD

1. Intent

The State authorizing legislation for this Compact states that it is the intent of the Legislature that the Liquor Control Board and the Department continue the division of duties and shared authority under Chapter 82.24 RCW and therefore the Liquor Control Board is responsible for enforcement activities that come under the terms of Chapter 82.24 RCW.

2. Notification

The Tribe or its designee shall notify the Department seventy-two (72) hours in advance of all shipments of unstamped cigarettes to the Tribe or tribal retailers if such shipments will occur outside the reservation boundaries. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number. Transportation of the cigarettes without the notice required by this section subjects the cigarettes to seizure.

3. Commercial Carriers

The State recognizes that shipments of cigarettes both from in state and from out-of-state wholesalers, who meet the requirements of this Compact, may be made by commercial carrier. Such shipments must be accompanied by documents as required under this Compact and subject to advance notice requirements.

PART VIII - INDEPENDENT THIRD PARTY AUDITOR

1. General

The Tribe wishes to provide assurance that all parties to this Compact and persons named in this Compact are in compliance with the spirit and terms of this Compact. The purpose of this Part is to provide a process for regular verification of the requirements in this Compact. The verification process is intended to reconcile data from all sources that make up the stamping, selling, and taxing activities under this Compact.

2. Tribe to Contract with Third Party Auditor

The Tribe and the State agree that, for the purposes of verifying compliance with this Compact, the Tribe will contract with an independent third party auditor. The Tribe will retain the Auditor and the Tribe shall bear the costs of the auditing services. The Tribe shall be entitled to freely communicate with the Auditor. The Auditor must be a certified public accountant licensed by the State of Washington and in good standing, such good standing subject to confirmation by the licensing board through which the auditor is licensed. The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part unless otherwise specified.

3. Audit Protocol

To ensure compliance with this Compact, the Auditor must adhere to the following protocol:

Period under review: To verify the requirements of this Compact, the Auditor must review records for all years during the current appropriate audit cycle, and may review records for earlier years after the date of the signing of the Compact only as necessary for an internal reconciliation of the entity's books. In situations where the Auditor is responsible for verifying records on less than an annual basis, the period under review shall not include years previously reviewed by the Auditor, except when a violation is alleged to have occurred during the period previously reviewed.

Records to be examined: To verify the requirements of this Compact, the Auditor must review at a minimum the records specified below. In all situations, the Auditor is not responsible for examining records that do not relate to the stamping, selling, or taxing activities of the Tribe, unless a review of the records is necessary for an internal reconciliation of the books:

- (a) Self-certified tribal wholesaler: records and invoices of stamp purchases, records and invoices of sales of stamped cigarettes, stamp inventory, and the stamping process;
- (b) Tribal retailers: financial statements or purchase invoices of cigarettes purchased from licensed wholesalers, self-certified tribal wholesalers and manufacturers, financial statements or sales invoices relating to sales of stamped cigarettes, sales of exempt cigarettes, cigarette inventory, records to verify whether Tribal cigarette and sales taxes were remitted to the Tribe for deposit into Tribal accounts, and records to verify that the retail selling price included the applicable tribal taxes.
- (c) Tribe: records such as account records and contract invoices necessary to verify that all Tribal cigarette tax revenue was used to fund essential government services described in Part XIII, section 8 of this Compact.

4. Audit Report Format

The Auditor shall provide the Department with a certified statement that, after each audit, the Auditor finds the Tribe to be in compliance with the terms of this Compact. The Department may view the audit report at the tribal Offices, but may not copy the same.

5. Initial Review

The first required review must cover the period starting on the effective date of the tax and ending December 31, 2005, and the Auditor must report its findings to the Tribe by April 1, 2006. This initial review shall include all of the activities covered by the protocol.

Thereafter, reviews shall take place on the regular audit period with an audit report submitted within three months of each audit. The audit cycle for this compact is on a calendar year basis. The Tribe and the Department may by prior joint agreement select or vary the audit cycle depending on the on-going audit activity of the Tribe, in order to be efficient and effective in the use of auditor resources.

6. Self-Certified tribal Wholesalers

The Auditor will be responsible for reviewing the records, identified in subsection 3(a) of this Part, of all self-certified tribal wholesalers that sell cigarettes to a tribal retailer to verify that the tribal cigarette tax was paid by the wholesaler, unless paid to the stamp vendor by the tribal retailer, and that the stamps were correctly affixed to containers of cigarettes.

The Auditor must review the records, identified in subsection 3(a) of this Part, of all self-certified tribal wholesalers that sell cigarettes to a tribal retailer, no less than once every four years. If a wholesaler that previously sold cigarettes to a tribal retailer stops making such sales, the Auditor must review the records of that wholesaler during the next regularly scheduled annual audit.

7. Tribal Retailer

The Auditor will be responsible for reviewing the records, identified in subsection 3(b) of this Part, of the tribal retailer to certify that the tribal taxes were collected, that all cigarettes are properly stamped, that cigarettes were obtained from wholesalers authorized under this Compact, that any exemptions from tax are documented, and that revenue from the tribal tax under this Compact are not used to subsidize the tribal retailer.

8. Joint Audit Implementation and Review

The Tribe and the State shall confer prior to the beginning of the initial audit cycle. The purpose will be to discuss the objectives of the upcoming audit, the expectations of both the Tribe and the State, the audit standards to be used in such audit, and any issues regarding detail of the audit, records pertinent to the review, or substance of the Auditor's report. Subsequent audit meetings will be held as required.

If warranted by the findings in the report, the Tribe and the State shall meet jointly with the Auditor to review the report and discuss any issues of concern. For the purposes of this section, "audit cycle" refers to the reoccurring scheduled audit of an entity.

9. Dispute Resolution In the event that either the Tribe or the Department disagrees with the Auditor's final report, either party may notify the other of the disagreement and follow the procedures for resolution of the disagreement in Part IX section 5 of this Compact.

PART IX - DISPUTE RESOLUTION

The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.

As used in this Part "days" means calendar days, unless otherwise specified.

1. Notification of Violation

If either party believes a violation of the agreement has occurred, it shall notify the other party in writing. The notice shall state the nature of the alleged violation and any proposed corrective action or remedy. The parties agree to meet within 14 days of receipt of the notice, unless the parties agree to a different date. The purpose of the meeting will be to attempt to resolve between them the issues raised by the notice of possible violation, and provide an opportunity to implement any agreed corrective action.

2. Mediation

If the parties are unable to resolve the disputed issues through joint discussions under section 1 of this Part, either party may request mediation by giving a written mediation demand to the other party. The parties shall first attempt to agree on a mediator. If the parties cannot agree on a mediator within 30 days of written demand, a three person mediation panel shall be used and shall be selected as follows: each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator.

The parties shall share equally the costs of mediation.

3. Remedies

Whenever an issue is submitted to mediation under this section, the mediators may recommend corrective action to remedy any violation that has occurred. In no case shall a mediator render an independent recommendation or decision on any issue on which the parties reach agreement. Remedies may include: audit of relevant tribal records, interpretation of Compact terms, changes in reporting, record keeping, enforcement practices, business practices, or similar actions. Remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Compact.

4. Termination of Compact

If, after no more than eight months from the initial Notice of Violation or notice of other disagreement, the parties are unable to resolve the disagreement or alleged violation and/or the appropriate corrective action using the dispute resolution methods authorized in this section, or if a party continues to violate a Compact term after the completion of the mediation process authorized in this section, this Compact may be terminated. The parties may, after no less than six (6) months following any such termination, enter into a new Compact.

5. Disagreements Regarding Reports of the Auditor

Should either party have a concern about a report from the Auditor, which cannot be resolved through the joint audit review process described in Part VIII of this Compact; that party may choose to resolve the concern through the use of a mediator chosen under the provisions of Part IX, paragraph 2. Failure of either party to grant the mediator access to any records necessary to review the report is a violation under this Compact. The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

6. Notification of For Cause Termination

Either party may terminate the Compact for cause. For the purposes of this section, "for-cause" shall mean only the following violations:

- (a) Retail sales of unstamped cigarettes during the effective period of a tribal cigarette tax;
- (b) Failure to submit to mediation as required by this Part IX;
- (c) A breach of the confidentiality provisions of Part XII of this Compact;
- (d) Failure of the Tribe to enforce the terms of this Compact in regards to member retailers; or
- (e) Use of tax proceeds in violation of the terms of this Compact.

The party seeking the termination for cause shall notify the other party and the mediator selected under Part IX, Section 2 of this Compact, who shall review the facts upon which the for-cause termination notice is based. The party making the allegation must provide a written recitation of the facts with the notice of termination. The responding party has ten days to provide its facts to the mediator. If the mediator determines that the alleged event has occurred, the Compact is terminated, however the party making the allegation may choose to go through the regular dispute resolution process in regard to the issue.

If the parties fail to reach agreement, or the For Cause Violation is not corrected, within one hundred eighty (180) days from the date of giving the Termination Notice, the Compact shall be terminated. If the parties reach agreement, or the for-cause violation is corrected during the notice period, the Compact shall not be terminated.

7. Notification of Sales to Minors Violation

The Department shall immediately notify the Tribe if an allegation is made that the Tribe has made sales to minors in violation of this Compact. Upon such notification, the Tribe shall take enforcement action according to the provisions of tribal law. Upon the third or subsequent violation within any rolling one-year period of the sales to minors provisions of this Compact the provisions of section 1 of this Part shall apply.

8. Notice Requirements

For the purposes of this Compact, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile or e-mail. Notice shall be deemed effective on the date of actual receipt. Notice shall be given as follows:

To the Department:

Director

Washington State Department of Revenue

P O Box 47454

Olympia, WA 98504-7454

To the Tribe:

Tribal Chair

P.O. Box 189

Taholah, WA 98587

9. **Sovereign Immunity**

Nothing in this Compact shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

PART X - RESPONSIBILITIES OF THE QUINAULT NATION, THE DEPARTMENT OF REVENUE, AND THE LIQUOR CONTROL BOARD

1. **Quinault Nation**

The Quinault Nation is responsible for both enforcement of the terms of this Compact and administration of the Compact, audit procedures and record keeping, and dispute resolution. The Quinault Nation agrees to allow the Department entry into retail stores, the purpose of such entry being limited to (a) visual observation of the retail sales taking place at the stores and (b) the purchase of cigarettes by the Department.

2. **Liquor Control Board**

This agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW.

3. **Department of Revenue**

The Department is responsible for the administration of the Compact, audit procedures and record keeping, and dispute resolution, as well as negotiation of its terms, on behalf of the Governor of the state of Washington.

PART XI - TERM OF THIS COMPACT - AMENDMENT

1. This Compact shall remain in effect no longer than eight (8) years from its effective date, subject to the termination provisions under Part IX of this Compact. The Compact shall be automatically renewed for successive periods of eight years, unless either party objects in writing at least thirty (30) days prior to the expiration date. Amendments to the Compact shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Compact shall be subject to the dispute resolution process in Part IX of this Compact.
2. In the event that the State negotiates a contract, compact, or other agreement with another Tribe on terms more favorable than those included in this Compact, the State shall disclose to the Tribe the more favorable terms within thirty days of the Contract containing those terms becoming effective. The Tribe may initiate discussions with the State to amend this Compact to incorporate more favorable terms if so desired by the Tribe.

PART XII - CONFIDENTIALITY

All information under the terms of this Compact received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330, the tax information "secrecy clause." All other information that is subject to review by the Auditor or review by the mediator or certified public accountant is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

PART XIII – MISCELLANEOUS PROVISIONS

1. Tribe Does Not Submit to State Jurisdiction

By entering into this Compact, the Tribe does not concede that the laws of the state of Washington, including its tax and tax collection provisions, apply to the Tribe, its members or agents regarding activities and conduct within or without Indian country.

2. State Does Not Concede Tribal Immunity

By entering into this Compact, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

3. Compact Does Not Create any Third Party Beneficiaries

No third party shall have any rights or obligations under this Compact.

4. Land Status

The Tribe shall provide information to the Department regarding the status of land upon which any new tribal retailer is located.

5. Tobacco Master Settlement Agreement

This Compact is not intended to impact the State's share of proceeds under the master settlement agreement entered into by the State on November 23, 1998.

The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the master settlement agreement. The Tribe agrees to not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters.

Nothing in this Compact supercedes or replaces chapter 70.157 RCW.

6. Periodic Review of Compact Status

Appropriate representatives of the Tribe and of the Department shall hold periodic meetings to review the status of this Compact and any issues that have arisen under the Compact. Those meetings shall be held no less frequently than once every twelve (12) months, but may be held more frequently.

7. Sales to Minors

The Tribe or a tribal retailer shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18) years.

8. **Essential Government Services**

- a. Tribal cigarette tax revenue shall be used for essential government services. The Auditor shall certify the use of revenue under the process set forth in Part VIII of this Compact.
- b. Tribal cigarette tax revenue may not be used to subsidize tribal cigarette and food retailers. "Subsidize" means that proceeds from the tribal cigarette tax cannot be expended on the direct business activities of the Tribal retail cigarette business. In addition, where the cigarette business is collocated with a retail food business, the proceeds cannot be expended on the direct business activities of the tribal retail cigarette business.
- c. The following definitions shall apply to this Part:
 - i. "Direct business activities" include paying wages, benefits, bonuses, or expenses, related to the maintenance and operation of the retail facility or typically considered to be part of a business's operating expenses and overhead;
 - ii. "Essential governmental services" include, but is not limited to government services to provide and maintain infrastructure such as sidewalks, roads, and utilities; services such as fire protection and law enforcement; the costs of administering the Tribal cigarette tax stamp program under this Compact, including all deductions and exemptions similar to those available to retailers, wholesalers, and others under state law, further including transportation vehicles and related costs; Tribal administration activities such as tax functions, contracting for health benefits, economic development, natural resources, and the provision of job services; and distribution of moneys related to trust funds, education, general assistance, such activities as land and building acquisitions, and building development and construction.

9. **Other Retail Sales within Indian Country by Tribal Members**

Under Quinault Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the retailer's sale of cigarettes remains out of compliance with the requirements of this Compact.

10. **Rule 192 - Application**

This Compact is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).

11. **Subsequent State Legislative Enactments**

Should the Legislature enact a law that provides more favorable terms for the Tribe, the parties shall amend the Compact to reflect such terms.

12. **Jurisdiction**

This Compact does not expand or limit the jurisdiction of either the Tribe or the State.

13. Severability

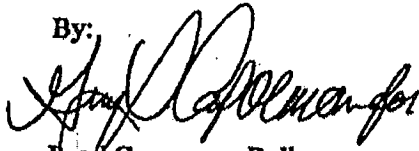
If any provision of this Compact or its application to any person or circumstance is held invalid, the remainder of the Compact is not affected.

THUS AGREED THIS 3rd day of January, 2009

QUINAULT NATION

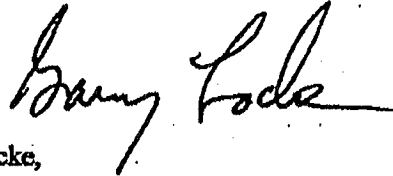
STATE OF WASHINGTON

By:



Pearl Capoceman-Baller
Tribal Chair

By:



Gary Locke,
Governor